FILED

96 486 SEP 24 1996

OFFICE OF THE CLERK

No. ____

In The

Supreme Court of the United States

October Term, 1995

ILA HARTSEL,

Petitioner,

vs.

MICHAEL B. KEYS,
individually and in his capacity as
Mayor of the City of Elyria, Ohio, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

ELLEN SIMON SACKS
LANCIONE & SIMON, P.L.L.
1717 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
Telephone (216) 575-1002

Counsel of Record for the Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

72 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether defendants in an action brought under the Age Discrimination in Employment Act, as a matter of law, rebut the plaintiff's prima facie case of age discrimination though the articulation of a legitimate non-discriminatory business reason for the challenged employment action, when the proffered justification is closely correlated to a trait widely shared by older Americans, and the plaintiff thereafter presents credible evidence that the proffered reason is a pretext?

2. Does a district court err in granting summary judgment for the defendants in an action brought under the Age Discrimination in Employment Act, in keeping with what some courts have identified as a "pretext-plus" burden of proof, when the plaintiff has established a prima facie case of age discrimination, the defendants have proffered a legitimate non-discriminatory reason for the challenged employment action, and the plaintiff has offered probative reliable evidence that the defendants' proffered justification is a pretext for discrimination, without necessarily establishing direct evidence of discriminatory animus, as would be sufficient under a "pretext-only" analysis?

LIST OF PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The parties to the proceedings below were the petitioner Ila Hartsel and the respondents, Michael Keys, the City of Elyria, Ohio, and the Utilities Department of the City of Elyria, Ohio. In the United States Court of Appeals, the petitioner appeared as the plaintiff-appellant, while each of the respondents appeared as a defendant-appellee. Respondent Michael Keys was named as a defendant in the United States District Court both in his individual capacity and in his official capacity as the Mayor of the City of Elyria, Ohio.

No parent companies are parties to this action, nor are there any corporate entities which are nonwholly owned subsidiaries required to be listed under SUP. CT. R. 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND RULES AT ISSUE 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT OF CERTIORARI 9

I. The defendants in an action brought under the Age Discrimination in Employment Act should not be granted summary judgment when, to rebut the plaintiff's prima facie case of discrimination, the defendants proffer as a legitimate non-discriminatory reason for its action a characteristic widely shared by older Americans, and the plaintiff thereafter produces evidence of pretext 9

II. The Sixth Circuit's opinion is unclear as to the evidentiary burden which an ADEA plaintiff must meet, in response to the defendant's articulation of a non-discriminatory reason for her non-promotion, in order to survive summary judgment, and conflicts with the holdings of other circuits with respect to this burden 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994) 10, 15, 17

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 10

Bodenheimer v. PPG Indus., Inc., 5 F.3d 955 (5th Cir. 1993) 16

Dister v. Continental Group, Inc., 859 F.2d 1108 (2d Cir. 1988) 7

Durham v. Xerox Corp., 18 F.3d 836 (10th Cir. 1994) 16

EEOC v. Wyoming, 460 U.S. 226 (1983) 12

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968) 10

Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104 (8th Cir. 1994) 15

Hairston v. Gainesville Sun Publ. Co., 9 F.3d 913 (11th Cir. 1993) 15

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) .. 11, 12, 13

LeBlanc v. Great American Insurance Co., 6 F.3d 836 (1st Cir. 1993) 16

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ..... *passim*

Mitchell v. Data General Corp., 12 F.3d 1310 (4th Cir. 1993) 15

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) ..... *passim*

Saulpaugh v. Monroe Community Hosp., 4 F.3d 134 (2d Cir. 1993) 16

TABLE OF AUTHORITIES – Continued

Page

Shager v. Upjohn Co, 913 F.2d 398 (7th Cir. 1990) 10

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) ..... *passim*

U.S. Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711 (1983) 9, 13

Waldron v. SL Industries, Inc., 849 F. Supp. 996 (D.N.J.1994) 16

Washington v. Garrett, 10 F.3d 1421 (9th Cir. 1993) 15

Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) 12

Western Airlines, Inc. v. Criswell, 472 U.S. 400 (1985) 12

STATUTES AND RULES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 5

28 U.S.C. § 1337 5

28 U.S.C. § 1343 5

29 U.S.C. § 621, *et seq* 1, 2, 4

42 U.S.C. § 1983 .....1, 4

42 U.S.C. § 2000e, *et seq* 1, 4

SECONDARY AUTHORITIES

Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991) 14

PETITION FOR WRIT OF CERTIORARI

Petitioner Ila Hartsel respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceedings on June 26, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 87 F.3d 795 (6th Cir. 1996), and is reprinted in the appendix hereto at page A-1. The memorandum decision of the United States District Court for the Northern District of Ohio (Aldrich, J.) has not been reported. It is reprinted in the appendix hereto at page A-23.

JURISDICTION

Invoking federal jurisdiction under the Civil Rights Act of 1964, As Amended, 42 U.S.C. § 2000e, *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, and the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983, the petitioner brought this action in the United States District Court for the Northern District of Ohio. The respondents moved for summary judgment with respect to each of these claims, and on May 26, 1994, the District Court granted their motion. (App.2, App.23).

Petitioner timely appealed the entry of summary judgment against her to the United States Court of

Appeals for the Sixth Circuit. On June 26, 1996, the Sixth Circuit affirmed the judgment of the district court, upholding the entry of summary judgment against the petitioner. (App.1). No petition for rehearing was filed.

The jurisdiction of this Court to review the June 26, 1996 judgment of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES AT ISSUE

Relevant portions of the Age Discrimination and Employment Act, 29 U.S.C. § 621, *et seq.*, and of FED. R. CIV. P. 56 are reprinted in the appendix to this petition, beginning at pages App.47 and App.48, respectively.

STATEMENT OF THE CASE

In March 1969, Petitioner Ila Hartsel began working as a clerk for the utilities department of the City of Elyria, Ohio. She became the department's office supervisor in April 1977, serving under Joe Grace, who had been the Superintendent of the department since 1969, and who would remain superintendent until 1992. (App.24). In early 1992, Grace took time off work to care for his ailing wife. In his absence, many of his job duties were performed by Hartsel. (App.24). In April 1992, Grace took time off work due to his own illness, and Hartsel increasingly performed his duties. In May 1992, Hartsel was

appointed Acting Superintendent of the utilities department. (App.24).

When Joe Grace finally resigned his position in November 1992, Hartsel expressed her interest in being permanently appointed Superintendent, informing both Safety-Service Director Tim Coey, and later Mayor Michael Keys of her desire. (App.24-5). Keys deferred his decision until late December, when he told Hartsel that he was "ninety-nine percent certain" that he would choose someone else to head the department on a permanent basis. (App.26). The Mayor also expressed his hope that Hartsel would remain on staff to help train the permanent Superintendent. Hartsel considered this, and rumors regarding her own replacement over the Christmas holiday. Convinced she would be returned to her prior position, while being required to perform the same duties, and train her replacement, for less pay, Hartsel submitted her resignation on the morning of December 31, 1992. (App.26-7).

Mayor Keys accepted the written resignation, effective at midnight, in a letter drafted within minutes of his receiving Hartsel's notice. Then, less than two hours later, the Mayor demoted Hartsel to her former position – office manager – ostensibly over concerns about the effective operation of the utilities department during the upcoming holiday weekend. (App.27). The record below established that Hartsel's eleventh hour reduction in grade cost her thousands of dollars, as years of accumulated sick and vacation time, for which she was entitled to payment, were calculated based on a salary some Thirteen Thousand Dollars ($13,000.00) less than she has

earned as Acting Superintendent. By midmorning, Hartsel had been replaced as Acting Superintendent by Thomas Brand. (App.27).

Brand was forty-two years old, and had no prior experience in the utilities department. Hartsel, who was sixty-two years old, had worked in the department for twenty-three years, had managed the utilities department office for fifteen years, and had performed the Superintendent's duties for nearly a year, capably and without criticism, when Brand was appointed.

Hartsel brought suit in District Court, alleging discrimination based on age, gender and retaliation for her involvement in the campaign of one of the mayor's electoral rivals. (App.1-2).[1] Seeking relief under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, Title VII of the Civil Rights Act of 1964, As Amended, 42 U.S.C. § 2000e, *et seq.*, and the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983, Hartsel invoked the District Court's

---

[1] Hartsel had been involved with the campaign of Billy Grace, son of Joe Grace, and an opponent of Mayor Keys in the 1991 primary election. (App.24). In the fall of 1992, Hartsel was told by Tim Coey that the mayor was still "very upset" over her involvement in the Grace campaign. Hartsel alleged that the mayor's failure to install her as Superintendent was motivated in part by a desire to retaliate against her for that involvement, in violation of her rights under the First and Fourteenth Amendments to the United States Constitution, and Article I § 11 of the Ohio Constitution. (App.32-3, App.41). Neither Hartsel's retaliation claim under 42 U.S.C. § 1983, nor her gender discrimination claim under 42 U.S.C. § 2000e *et seq.*, is implicated herein.

jurisdiction under 28 U.S.C. §§ 1331, 1337 and 1343. The defendants moved for summary judgment with respect to each of her claims.

The district court did not reach the question of whether Hartsel's non-promotion had amounted to a constructive discharge (App.34), and for purposes of granting summary judgment for the defendants, assumed that Hartsel had made a *prima facie* case of age discrimination under the familiar analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and later clarified in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (App.30, App.34). The Court of Appeals left that conclusion intact (App.9) and with respect to Hartsel's age discrimination claim focused upon the persuasiveness of the evidence which she had articulated in response to the proffered reason for her non-promotion: a lack of computer skills, in light of what the defendants claimed was an imminent upgrade of the utilities department's computer system. (App.9-10).

The District Court had deemed the "computer skills" justification to be a legitimate and non-discriminatory reason for Hartsel's non-promotion (App.30, App.35), and the Sixth Circuit agreed (App.10). The questions presented herein for review, however, arise from the standard of proof which the lower courts placed upon Hartsel after concluding that she had made a *prima facie* case of discrimination, and that the respondents had met the burden of production imposed on them by the second step of the *McDonnell-Burdine* analysis. The precise scope of that burden is unclear from the opinions below, which contradict each other, and in places, themselves.

The District Court held that, once the respondents had articulated a non-discriminatory reason for the challenged employment action:

> [t]he employee then bears the burden of showing that the preferred reason was not the true reason for the employment decision, ***and*** that the real reason was the discriminatory motive.

(App.31-2) (emphasis added). Later in the same opinion, the District Court articulated a substantially different standard. Relying upon this Court's then-recent decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the court explained its grant of summary judgment thus:

> Under *Hicks*, evidence discrediting the justification of the employer creates a fact issue making summary judgment inappropriate.

(App.40). That these are different standards is self-evident. Under the first, the plaintiff needs to present evidence both that the defendant's proferred justification for its actions is pretextual, ***and*** that the defendant's actual motive was discriminatory, in order to present a triable question of fact. Under the second, the plaintiff need only present credible evidence that the proffered reason was pretextual in order to reach a jury.

On appeal, the Sixth Circuit's analysis presented a similar lack of precision with respect to the burden ADEA plaintiffs face once their employer has offered a seemingly legitimate justification for a challenged employment action. Relying on *Hicks*, that court held that:

> Once the *prima facie* case is made, the defendant may offer any legitimate, non-discriminatory reason for the employment action, which the

> plaintiff may rebut by evidence of pretext; however the burden of proof always remains with the plaintiff.
>
> * * *
>
> Hartsel's failure to produce direct evidence of either pretext or discriminatory animus is fatal.

(App.9, App.12). This leaves unresolved the larger question of whether the rebuttal of the proffered justification is, in itself, sufficient to permit the plaintiff to withstand summary judgment at this stage of the *McDonnell-Burdine* analysis. The Court of Appeals noted that summary judgement is not appropriate every time an employer offers its business judgment (about the relative worth of job candidates) to rebut the presumption raised by a plaintiff's *prima facie* case, and explained that:

> [f]acts may exist from which a reasonable jury could conclude that the employer's business decision was so lacking in merit as to call into question its genuineness.

(App.10) (*quoting*: *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988), *cert. denied*, 115 S.Ct. 80 (1994)). Unresolved by this analysis is whether those facts, on their own, are sufficient to permit the plaintiff to withstand summary judgment, or whether additional facts tending to support a discriminatory animus are also necessary at this stage of production and proof.

Hartsel ***did*** adduce facts in the District Court which might have lead a jury to believe that the decision not to promote her was unrelated to her computer skills. That evidence included proof that other city departments had experienced successful computer upgrades under the

leadership of superintendents with skills not substantially greater than her own; that extra-departmental personnel were used to assist in the implementation of upgrades in other departments; that the technical assessments of hardware Hartsel was supposedly unqualified to make had already largely been made by the time the city decided not to promote her, and; that she was not offered an opportunity to receive training in computer skills, as her successor had been when he first oversaw a departmental computer upgrade. Hartsel also argued below that the computer skills in question were of a sort more commonly possessed by younger employees, and that this in itself raised the prospect of pretext.

Despite this evidence, the District Court concluded that Hartsel could not, as a matter of law, establish that:

> the defendant's legitimate reason for its decision is unworthy of belief, or that discrimination was more likely the reason for the decision. . . .

(App.40). The Sixth Circuit affirmed, and specifically rejected Hartsel's argument that the reliance on computer skills by the city in itself raised the prospect of pretext. (App.13).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

The defendant in an action brought under the Age Discrimination in Employment Act should not be granted summary judgment when, to rebut the plaintiff's *prima facie* case of discrimination, the defendant proffers as a legitimate non-discriminatory reason for its action a characteristic widely shared by older Americans, and the plaintiff thereafter produces evidence of pretext.

Under the familiar burden-shifting framework of *McDonnell Douglas* and *Burdine*, the plaintiff in an ADEA case bears the burden of establishing a *prima facie* case of discrimination, after which the defendant bears the burden of articulating a legitimate, non-discriminatory reason for the challenged employment action. Once the defendant has offered such a reason for the challenged employment action, the plaintiff is entitled to an "opportunity to demonstrate that the proffered reason for the employment decision was not the true reason for the employment decision" but a pretext. *U.S. Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711, 716 (1983) (*quoting Burdine*, 450 U.S. at 256).

In *Hicks*, this Court made clear that a plaintiff ***could*** survive summary judgment in the third phase of the *McDonnell-Burdine* analysis simply by introducing evidence from which a jury could conclude that the defendant's proffered justification was pretextual:

> The fact finder's disbelief of the reasons put forward by the defendant (particularly if that disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the

> prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's preferred reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is *required*. . . .

Hicks, 509 U.S. at 511. Thus, under *Hicks*, a defendant's proffered justification may be self-defeating; if it may be perceived as false, that perception alone is enough to preserve the possibility of a plaintiff's verdict. While *Hicks* assesses the *McDonnell-Burdine* analysis in the context of trial, a plaintiff facing the same burden of rebuttal in the context of defending against a summary judgment motion should be judged by a more lenient standard of proof. *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994). Such plaintiffs must produce evidence from which the fact finder could conclude that the employer lied in rebutting her *prima facie* case. *Id.* (*citing Shager v. Upjohn Co.*, 912 F.2d 398, 401 (7th Cir. 1990).

Of course, the evidence upon which the plaintiff relies must present a *genuine* factual dispute, which mandates only evidence sufficient to require that the trier of fact "resolve the parties' differing versions of the truth at trial." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986) (*quoting First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968)).

That a genuine question of pretext is always material is clear from *Hicks*, since the rejection of the defendant's proffered rebuttal is in itself enough to sustain, as a matter of law, a finding of discrimination otherwise made

by the trier of fact. *Hicks*, 509 U.S. at 511, n.4. The question in this light is under what circumstances is a plaintiff entitled to present to the trier of fact her contention that the defendant's proffered rationale is pretextual. Petitioner contends that she be allowed to do so in any case in which the defendant's proffered justification identifies, as the basis of its decision, a trait widely shared by members of the protected class, and when the plaintiff produces probative and reliable evidence that the trait in question is not legitimately connected to the job at issue.

Petitioner does not seek review of this Court's teaching in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) that there as yet exists no recognized cause of action for disparate impact discrimination under the ADEA. Nor does the petitioner argue, in contravention of that decision, that the reliance upon a trait shared by older Americans (such as a comparative lack of computer skills) amounts to disparate treatment discrimination based solely upon the correlation between the asserted job criterion and the trait shared by the protected class. *Id.* at 612 (holding that discrimination based on a trait which positively correlates with age does not violate the ADEA unless the discriminatory animus was directed at age, and not the trait in question).

Rather, the petitioner suggests that when the defendant attempts to rebut a plaintiff's *prima facie* case of age discrimination by claiming that the plaintiff either has (or lacks) a trait which is widely shared (or widely lacked) by older Americans, a district court errs in granting the defendant summary judgment when the plaintiff has introduced credible evidence of pretext.

As this Court taught in *EEOC v. Wyoming*, 460 U.S. 226 (1983), age discrimination is based in large part on stereotypical views of what older workers can and cannot do, and is rarely motivated by the sort of overt discriminatory animus that occurs in other types of discrimination. *Id.* at 610-11. Under *Hazen*, the articulation of such a stereotypical view does not ***in itself*** amount to an admission of wrongful discrimination, since the plaintiff can only invoke the protection of the ADEA when age, and not a factor closely correlated with age, motivates the discrimination. *Hazen*, 507 U.S. at 611.

The articulation of such a motive does, without more, point up the possibility that the employer has "rel[ied] on age as a proxy for an employee's remaining characteristics," *Id.*, and failed to evaluate the protected older employee "on [her] merits and not on [her] age." *Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 422 (1985).

It is accordingly inappropriate for a court to grant summary judgment for a defendant who has relied upon such a justification, especially in cases such as this, where the plaintiff has produced credible evidence showing that the characteristic identified by the employer was unrelated to the job in question.

The *McDonnell-Burdine* framework is not in itself a substantive part of the law of employment discrimination, but is rather a "means of arranging the presentation of evidence," *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988) to aid in cases where questions of proof "tend to be difficult and sensitive," and seldom involve "eyewitness testimony" regarding the employer's motivations. *Aikens*, 460 U.S. at 716.

It is well-settled that the plaintiff may carry the burden of refuting the defendant's proffered rebuttal indirectly, by demonstrating that "the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. That burden may be met with direct or circumstantial evidence. Once the defendant has articulated a supposedly legitimate reason for the challenged employment action, the case should be evaluated with a new level of specificity, *Aikens*, 460 U.S. at 715.

Petitioner now argues that when a defendant's justification is self-evidently linked to the stereotypical images which attach to older workers, the focus sought by the *McDonnell-Burdine* approach to the evidence is not achieved. Rather, the articulation of such a reason – ***in and of itself*** – creates an issue for the finder of fact. The defendant whose rationale encompasses traits widely shared by the protected class calls into question, through such an assertion, whether it has in fact used age as a "proxy" for characteristics which are impermissibly and wrongly associated with age. That sort of substitution is forbidden under the ADEA. *Hazen*, 507 U.S. at 611. Petitioner does ***not*** assert that the mere identification, by the defendant, of such a motivation *compels* a finding of discrimination. Rather, petitioner merely argues that the reliance on such a justification precludes summary judgment for the defendant when the plaintiff has produced evidence of pretext.

The proposition preserves a plaintiff's burden to produce evidence in response to a defendant's proffered justification in keeping with *Hicks*, 509 U.S. at 510-11, while recognizing that, as a common-sense matter, certain proffered justifications are so self-evidently suspect that,

by their very nature, they present a question of pretext for the fact finder.

II.

The Sixth Circuit's opinion is unclear as to the evidentiary burden which an ADEA plaintiff must meet, in response to the defendant's articulation of a non-discriminatory reason for her non-promotion, in order to survive summary judgment, and conflicts with the holdings of other circuits with respect to this burden.

Prior to this Court's decision in *Hicks*, there was conflict among the Circuits as to whether a plaintiff in a discrimination action could survive summary judgment simply through the introduction of evidence that the defendant's proffered justification at the second stage of the *McDonnell-Burdine* analysis was a pretext. *See generally* Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS, L.J. 57 (1991) (collecting cases establishing conflict in the circuits with respect to the plaintiff's burden of proof after the defendant's rebuttal of the *prima facie* case). An essential point of contention was whether a plaintiff, confronted by the articulation of a legitimate and non-discriminatory justification for a challenged employment action, could preserve a genuine issue of fact for trial simply by introducing evidence that the defendant's proffered reason was pretextual:

> Most of the courts of appeals [to have] considered the question . . . followed *Burdine* and . . . held that a plaintiff may prove pretext, and thus prove intentional discrimination, by

> showing that the reasons offered for the employment decision are untrue.

Id. at 65. By contrast, before *Hicks*:

> a significant minority of courts . . . reason[ed] that the plaintiff must produce some additional evidence to show not only that the employer has concealed some other reason by its pretextual explanation, but also that the reason concealed by the employer was intentional discrimination.

Id., at 66. Despite this Court's guidance in *Hicks*, the Circuit Courts appear to remain divided on this very issue. As succinctly summarized by one federal court:

> The circuits are divided on the issue of what proof must be presented by the plaintiff to avoid summary judgment under the standards outlined in [*Hicks*]. The Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits have found that, where the plaintiff establishes a prima facie case and raises a genuine issue of material fact as to whether the employer's explanation for its action is true, summary judgment is inappropriate. *See Mitchell v. Data General Corp.*, 12 F.3d 1310 (4th Cir. 1993); *Anderson v. Baxter*, 13 F.3d 1120 (7th Cir. 1994); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1994 WL 59826 (8th Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *Hairston v. Gainesville Sun Publ. Co.*, 9 F.3d 913, 921 (11th Cir. 1993); *but see Gaworski, supra*, at (Gibson, J., dissenting).
>
> * * *
>
> Other courts have required a more substantial showing on plaintiff's part. The First, Second, Fifth, and Tenth Circuits have required that the plaintiff demonstrate both that the employer's

> reasons are false and that the real reasons were discriminatory – the so-called "pretext-plus" standard. *See LeBlanc v. Great American Insurance Co.*, 6 F.3d 836 (1st Cir. 1993), *cert. denied*, 128 L. Ed. 2d 72, 1994 U.S. LEXIS 2691, 1994 WL 54360, 114 S. Ct. 1398 (1994); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134 (2d Cir. 1993); *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 957 (5th Cir. 1993); *Durham v. Xerox Corp.*, 18 F.3d 836, 1994 WL 55005 (10th Cir. 1994).

Waldron v. SL Industries, Inc., 849 F. Supp. 996, 1004-05 n.11 (D.N.J.1994), *rev'd, remanded* 56 F.3d 491 (3d Cir. 1995) (holding that the district court had improperly predicted that the Third Circuit would adopt a "pre-text plus" analysis after *Hicks*, and reversing summary judgment against the plaintiff accordingly). Significantly, the disparity between these standards is reflected in the opinions below. The District Court required the Petitioner to establish that "the proferred reason was not the true reason for the employment decision, and that the real reason was the discriminatory motive" (App.32). The Sixth Circuit, by contrast, affirmed the District Court's "pretext-plus" decision while itself holding that "[f]acts may exist from which a reasonable jury could conclude that the employer's business decision was so lacking in merit as to call into question its genuineness" (App.10).

It is with great assuredness that the Circuit Courts have cited *Hicks* for the contradictory propositions directly implicated in this case. *Compare Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993) (holding that discrimination must be proved both by the refutation of the employer's rebuttal justification for its employment actions and by positive evidence of a discriminatory

animus, and holding that *Hicks* had "put the issue to bed" with respect to that burden) *with Baxter Healthcare*, 13 F.3d at 1123 (holding that *Hicks* had adopted the Seventh Circuit's "pretext-only" rule over the "pretext-plus" analysis of the First Circuit).

In short, despite this Court's clear articulation in *Hicks* that no additional showing beyond proof of pretext is ***required*** to preserve a factual issue under the *McDonnell-Burdine* analysis, the Circuit Courts are as divided as they were before *Hicks* on the proper scope of the plaintiff's burden in that phase of the *McDonnell-Burdine* round of proofs.

CONCLUSION

When the defendant in an ADEA action rebuts the plaintiff's *prima facie* case by asserting that its challenged employment action was based upon a trait widely shared by older Americans, that justification in itself presents an issue of material fact which should preclude summary judgment if the plaintiff then produces credible evidence of pretext. Despite this Court's teaching in *Hicks*, the Circuit Courts, like the courts below, remain divided on whether proof of such pretext will in itself suffice to forfend summary judgment for the defendant. Because of the widespread division on this point, and the significant interest that ADEA litigants have in a uniform protection of their rights, the guidence of this Court is required to resolve the uncertainty regarding the plaintiff's burden in such cases.

Accordingly, the petitioner respectfully requests that this Court grant the petition for a writ of certiorari to review the opinion and judgment of the Sixth Circuit, or summarily reverse the ruling of the court below.

Respectfully submitted,

ELLEN SIMON SACKS
LANCIONE & SIMON, P.L.L.
1717 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
Telephone (216) 575-1002

Counsel of Record

No. 94-3693

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ILA HARTSEL, *Plaintiff-Appellant,* v. MICHAEL B. KEYS, individually and in his capacity as Mayor of the City of Elyria; the CITY OF ELYRIA, OHIO; and the CITY OF ELYRIA UTILITIES DEPARTMENT, *Defendants-Appellees.*	)	ON APPEAL from the United States District Court for the Northern District of Ohio

---

Decided and Filed June 26, 1996

Before: JONES and BOGGS, Circuit Judges; and CHURCHILL, District Judge.*

BOGGS, Circuit Judge. Ila Hartsel appeals the district court's grant of summary judgment for the defendants, the City of Elyria and the Elyria Utilities Department ("City") and Michael Keys, its mayor. Hartsel's suit arises from her failure to be promoted to Superintendent of the Utilities Department. She alleges discrimination on the

---

* The Honorable James P. Churchill, United States District Judge for the Eastern District of Michigan, sitting by designation.

basis of gender, in violation of Title VII, 42 U.S.C. § 2000e *et seq.*; discrimination on the basis of age, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*; and deprivation of her rights of speech and association under the First and Fourteenth Amendments to the United States Constitution and Article I, § 11 of the Ohio Constitution.

The defendants counter that Hartsel was not selected to be Superintendent because the City was about to implement a major computerization of the Utilities Department and that Hartsel had poor computer skills. The district court granted summary judgment for the defendants because Hartsel failed to demonstrate an issue of material fact sufficient to rebut defendants' legitimate, non-discriminatory reason for not promoting Hartsel. Hartsel timely appeals.

For the reasons that follow, we find that Hartsel has failed to produce more than a scintilla of evidence supporting her claims under her various theories. Accordingly, we affirm the district court's decision.

I

Hartsel started working in the Elyria Utilities Department as a clerk-typist in March 1969. In 1977, she was promoted to office supervisor, where she worked under Joe Grace, the utility department's superintendent. Grace held the position of superintendent from 1969 until 1992. In early 1991, Hartsel performed many of the superintendent's duties when Grace missed work due to his wife's illness. Hartsel continued to perform many of these

duties in April 1992, when Grace was absent due to his own poor health.

In the spring of 1991, Joe Grace's son, Billy, ran against Mayor Keys in a party primary election for mayor. Hartsel publicly supported Billy Grace and assisted the campaign with signs, calling voters, and sat with the Graces at a candidate debate. Keys defeated Grace in the May 1991 primary.

In 1992, Hartsel became uncomfortable fulfilling so many of Grace's duties in an unofficial capacity, and in late April 1992, she approached Safety-Service Director Tim Coey to discuss the problem of Grace's prolonged absence. After Coey discussed the issue with Mayor (and defendant) Michael Keys, she was promoted on May 1, 1992, to Acting Superintendent of the Utilities Department. The new position paid Hartsel approximately $13,000 more than her salary as office supervisor.

Hartsel claims that, in late 1992, Coey had told her that Keys "was very upset" when he saw her sitting with Bill Grace at a campaign debate; Coey does not remember such a conversation. Joe Grace officially resigned on November 30, 1992, and Hartsel expressed her desire to remain as superintendent permanently, first to Coey, and then to Keys. The mayor indicated that he expected to make a final decision on the appointment around the first of the new year.

Tom Brand, a forty-three-year-old deputy auditor in the city's auditing department, also expressed interest in the job. Brand, along with Grace, had played a major role in computerizing the installment department of Elyria's municipal court in 1986. In 1988, Brand had also played a

prominent role in computerizing the whole municipal court, which required him to write specifications for the new system and to demonstrate the software to the employees who would use it. Brand had acquired additional computer knowledge by attending adult education classes at night, and he received training from Hewlett-Packard in conjunction with his computerization of the municipal court.

Hartsel met with Mayor Keys on December 21, 1992, to discuss the situation. Hartsel alleges that, during the meeting, Keys said three times that he was "99% sure" that he was going to appoint somebody with more computer experience and that he wanted her to stay on "and help the new man" because of her experience and skills. Hartsel interpreted this to mean that she would have to train her replacement, although nobody ever told her as much. Keys and Hartsel also discussed her possible retirement plans.

Hartsel claimed that she had heard through the "grapevine rumor mill" over the next few days that Brand was to be promoted to superintendent. During her Christmas vacation, Hartsel stewed over this information, until she concluded that going back to her job as office supervisor and training a less-qualified replacement would be "intolerable." When she returned to work on December 31, 1992, Hartsel submitted a letter of resignation at 9:45 a.m., effective midnight. Keys accepted her resignation at 10:00 a.m., but at 11:40 a.m., he reassigned Hartsel to her prior position as office manager and appointed Brand as Acting Superintendent, effective 11:00 a.m. Keys later justified this decision on the basis that he wanted to maintain a chain of responsibility over

the building over the long New Year's weekend, that he was concerned about the abrupt nature of Hartsel's departure, and that Hartsel had returned her keys to the building. Coey was similarly "not thrilled about the idea of having an employee in charge who had after 20 some odd years of service given us a two-hour [sic] notice of resignation."

II

On June 10, 1993, Hartsel sued the City and Keys, claiming that the refusal to promote her to permanent Superintendent constituted a constructive discharge from her job. Defendants moved for summary judgment on January 31, 1994, and plaintiff filed motions and briefs in opposition. On May 27, 1994, the district court granted summary judgment for the defendants, and an appropriate order was entered on May 31, 1994.

Judge Aldrich granted summary judgment on the age and sex discrimination claims because Hartsel failed to create an issue of material fact sufficient to rebut defendants' legitimate, non-discriminatory reason for not promoting Hartsel – that "the city sought a new superintendent with computer skills necessary to assist in the upgrade of computers in the Public Utilities Department." The district court noted that Hartsel did not dispute that Brand was more experienced with computers, and "[t]here is nothing illegal about seeking a candidate with the skills necessary to best perform the tasks ahead." Memorandum and Order May 26, 1994, at 17. Indeed, Hartsel's evidence actually supported the defendants' claim that Brand was hired to implement a new

computer system – Elyria had purchased an expensive and complex computer and continues to implement the system. The court therefore granted summary judgment, finding that "none of Hartsel's evidence tends to show that the defendant's legitimate reason for its decision is unworthy of belief, or that discrimination was more likely the reason for the decision."[1] *Id.* at 19.

The district court also dismissed Hartsel's § 1983 claim of retaliatory discharge because she had "offered insufficient evidence for this Court to find that her political expression was a 'motivating factor' in the decision not to appoint her." *Id.* at 20. The district court described the causal connection between the mayoral primary in May 1991 and Keys's decision not to promote Hartsel in December 1992 as "extremely attenuated," particularly in light of his April 1992 decision to make her acting superintendent with a salary increase of $13,000. Hartsel's only evidence of discriminatory motive was Coey's alleged comment that Keys was upset with her, which the court discounted as a "mere scintilla of evidence" that would not prevent summary judgment. *Id.*, at 21.

III

This court reviews *de novo* the district court's grant of defendants' motion for summary judgment. *Baggs v.*

---

[1] The district court dismissed Hartsel's so-called "statistical evidence" that only one of Elyria's sixteen department heads is female, because she provided no background facts, such as the number of women in each department, and the sex and qualifications of applicants for the department head positions.

Eagle-Picher Industries, Inc., 957 F.2d 268, 271 (6th Cir.), *cert. denied*, 506 U.S. 975, 113 S.Ct. 466, 21 L.Ed.2d 374 (1992). This court must affirm the district court only if it determines that the pleadings, affidavits, and other submissions show "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When evaluating this appeal, this court must view the evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The moving party need not support its motion with evidence disproving the nonmoving party's claim, but need only " 'show[ ]' – that is, point[ ] out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The pivotal question is whether the party bearing the burden of proof has presented a jury question as to each element of its case. *Id.*, 477 U.S. at 322.

The plaintiff must present more than a mere scintilla of evidence in support of her position; the plaintiff must present "evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202(1986). Accordingly, hearsay evidence may not be considered on a motion for summary judgment. *Wiley v. United States*, 20 F.3d 222, 226 (6th Cir. 1994). "The 'mere possibility' of a factual dispute is not enough." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992) (*quoting Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 863 (6th Cir. 1986)). Accordingly, this standard requires a court to make a preliminary

assessment of the evidence, in order to decide whether the plaintiff's evidence concerns a material issue and is more than *de minimis*.

IV

As a preliminary matter, we reject plaintiff's suggestion that she was constructively discharged. Hartsel argues that the Mayor's failure to promote her to what she perceives as her rightful position created intolerable work conditions, such that her preemptive resignation the morning of December 31, 1992, was essentially a firing; she offers no other evidence that shows she was driven out of her prior position. If we were to accept this line of reasoning, every person passed over for a purportedly deserved promotion could bring an illegal discharge suit, and the distinction between the two would be erased. Instead, we treat her allegations as a failure to promote claim.

Liability in a disparate treatment case depends on whether the protected trait actually motivated the employer's decision. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *see Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993); *Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 871 (6th Cir. 1990). "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . " *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

Under the now-familiar burden-shifting principle of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93

S.Ct. 1817, 36 L.Ed.2d 668 (1973), a plaintiff establishes a *prima facie* case and creates a presumption of discrimination by showing: (1) membership in the protected class; (2) that she suffered adverse employment action; (3) that she was otherwise qualified for the position; and (4) following the plaintiff's rejection, the position was filled by a person outside of the protected class.[2] This general framework applies to both gender and age discrimination, with appropriate modification.

Once the *prima facie* case is made, a defendant may offer any legitimate, non-discriminatory reason for the employment action, which the plaintiff may rebut by evidence of pretext; however, the burden of proof always remains with the plaintiff. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). It is important to note that the defendant need not *prove* a nondiscriminatory reason for not promoting Hartsel, but need merely *articulate* a valid rationale. *Id.* at 514.

The district court found that Hartsel had satisfied the elements of a *prima facie* case for both sex and age discrimination, and we need not disturb its conclusion. Thus, the relevant issue is whether the proffered reason for promoting Brand rather than Hartsel was instead a pretext for illegal discrimination. In this case, the defendants claimed that their non-discriminatory reason was

---

[2] The Supreme Court has recently held that in ADEA suits, the replacement need not be younger than 40, although the difference in age between the plaintiff and the younger replacement may be probative of ageist bias. *O'Connor v. Consolidated Coin Caterers Corp.*, ___ U.S. ___, ___, 116 S. Ct. 1307, 1310, 134 L.Ed.2d 433 (1996).

that Hartsel lacked the computer skills necessary to lead the upgrading that the department needed. As plaintiff notes, summary judgment is not appropriate every time an employer offers this "business judgment" rationale. "The distinction lies between a poor business decision and a reason manufactured to avoid liability. Thus, facts may exist from which a reasonable jury could conclude that the employer's 'business decision' was so lacking in merit as to call into question its genuineness." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988).

Here, the facts do not at all lack merit, and much of the evidence most damaging to Hartsel's allegations comes from her own testimony. For example, Hartsel claims the defendants inflated the position's qualifications as a facade, designed to keep her from getting the job. In fact, she virtually concedes that she was not qualified for the superintendent's position, as defined by Keys:

> . . . I felt as if I had considerable experience in operating the terminals, turning the computer on and off, when necessary, and I had a lot of experience inputting into the computer on a daily basis. . . . I knew what I wanted out of the computer and I knew what I wanted put in, which I could explain to the data processing supervisor on what I needed and wanted. . . .

Hartsel Dep. at 18. Further, Hartsel admits that the mayor "knew I could not operate the computer, as far as putting the programs on and all this type of thing." This self-assessment is consistent with Coey's characterization of Hartsel's skills:

> From working with Ila and from working with the department, it is my understanding that

> computer skills was not her strong point. . . . We have a data processing supervisor[3] in the department, and Ila . . . did not work in that area and had limited knowledge of computer abilities.

Hartsel counters with the affidavits of several co-workers that the department functioned well when she was Acting Superintendent. William Fullgrabe, an Engineering Department employee, stated that "Hartsel was doing a good job" and "was well qualified for the Superintendent's position." Mary Grace stated that Hartsel "did a great job," that "I do not believe that it was necessary . . . to appoint someone with a data processing background," and that "[g]iven Ila Hartsel's experience in the department and her knowledge of the ordinances, rules and regulations, I believe that she was more qualified than Tom Brand." Tami White, a meter reader who worked in the Utilities Department when the cold prevented outside work on January 18 and 19, 1994, stated that the mail was four days behind under Brand, but "[w]hen Ila Hartsel was Acting Superintendent, the Department rarely got even two days behind on its mail."

---

[3] Mary Grace (apparently no relation to Joe or Billy Grace) had worked with Hartsel as the Utilities Department data processing supervisor. Ms. Grace majored in data processing in acquiring her Associates Degree in Applied Business from Lorain Community College. Ms. Grace opined that it was unnecessary to appoint a person with a data processing background to the superintendent position, in part because "I was available, with years of experience and a degree, to assist Ila Hartsel with any and all computer issues." However, the availability of Ms. Grace does not preclude the Mayor from hiring a candidate based on computer proficiency, nor does it transmute a business judgment into a pretext.

However, these affidavits miss the point. There is no doubt that Brand and Hartsel have differing strengths and weaknesses, and that Hartsel performed her duties as Office Manager and Acting Superintendent well. The law does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with. Rather, employers may not hire, fire, or promote for impermissible, discriminatory reasons. These affidavits reveal perhaps a reasonable difference in opinion, but their bald assertions and conclusory statements fail to provide any factual support for Hartsel's claim of sexist, ageist, or politically retaliatory animus.

Hartsel's failure to produce direct evidence of either pretext or discriminatory animus is fatal. There is no testimony that computer skills were not highly desirable for the superintendent's position, and Hartsel only disputes the degree of familiarity needed and argues that the job could have been done by a less expert employee, herself. The evidence supports the defendants' use of computer expertise as a hiring criterion: the city had long been urged to modernize its computer system; shortly after Hartsel resigned, it did so; the previous superintendent, Joe Grace, was much more familiar with computers than Hartsel; and, Brand was much more skilled with the technology than she was. As a result, Hartsel's circumstantial evidence is mere speculation ungrounded in fact, and Keys has demonstrated "an absence of evidence to support the non-moving party's case," as required by *Celotex*, 477 U.S. at 325.

To support her claims of discrimination based on gender, Hartsel cites the dearth of female department heads, although Hartsel admits that she does not know

how many women applied for department head positions.[4] Ironically, she bases her belief of gender discrimination on her "women's intuition" about "the tone of the whole situation." Hartsel Dep. at 41-44. Although she concedes that Keys never said or did anything to indicate a tone of bias – she claimed that "it is just one of those things that you feel" – she pointed to Keys's "body language" and "vibes." Clearly, Hartsel has failed to proffer sufficient information to put these extremely subjective and vague allegations in logical context, and has therefore failed to exceed the scintilla threshold to prevent summary judgment.

Hartsel infers age bias from the injustice of requiring older workers who "didn't grow up with [computers] the way these kids are doing" to compete for promotions against "younger" employees. In a sense, every technological advancement appears to favor the young, but only if one presupposes that older workers are more resistant to change and are adverse to learning new methods; ironically, this is the very type of ageist stereotype that

---

[4] In reality, this is not evidence of discriminatory treatment, but rather, a claim of disparate impact. A disparate impact theory of discrimination exists because "some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). A plaintiff must show for a prima facie case of disparate impact "that a specific employment practice or policy caused a significant disparate impact on a protected group," in this case, women or older workers. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). Hartsel identified no practice as causing such impact.

the ADEA was enacted to address. In fact, Brand is forty-three (within the protected class himself and hardly a callow youth), and he states that he also did not grow up with computers, but instead went to adult education classes and sought outside training to become more computer literate. We decline this invitation to hold that requiring computer skills for a promotion is alone sufficient to create a *prima facie* case of age discrimination.

Hartsel relies on several cases, all of which are distinguishable. The plaintiff supported her claim of constructive discharge in *Acrey v. American Sheep Industry Ass'n*, 981 F.2d 1569, 1573 (10th Cir. 1992), with testimony that the employer had told her that she was "too old" and "did not fit the image [the company] wished to project." Significantly, the plaintiff in *Acrey* was let go because she lacked the ability to use a new accounting system, but she offered evidence that the defendants had intentionally withheld the proper training to create an excuse to fire her. *Id.* at 1572-73. Likewise, *Krause v. Dresser Indus., Inc.*, 910 F.2d 674, 677 (10th Cir. 1990), is inapplicable because, in that case, the plaintiff demonstrated that his employer's proffered reasons were pretextual because the younger employee who was hired acquired the required computer skills only *after* the plaintiff was fired.

In a post-oral argument submission, Hartsel cites the unpublished case of *Kline v. TVA*, No. 92-5919, 1993 WL 288280 (6th Cir. July 29, 1993), for the proposition that whether, in that case, a "plaintiff was better qualified for the job is a question that should not have been decided in summary judgment proceedings," *id.* at *5, is also misplaced. Even accepting as a generality this statement of

the specific holding in *Kline*,[5] the fact remains that there is no question that Brand is more qualified than Hartsel – the parties have practically stipulated to that by their respective testimonies. The relevant factual inquiry is whether computer expertise was a valid job criterion, or if it was a pretense designed to thwart Hartsel's promotion. Since the latter claim is based solely on speculation and hunches, the plaintiff has not created a *genuine* issue of *material* fact sufficient to prevent summary judgment.

V

Hartsel's § 1983 claim of retaliatory "discharge" suffers from a similar absence of evidence. Unlike the claims of sex and age discrimination, where the evidence is based entirely on Hartsel's subjective beliefs and intuition, Hartsel has produced some circumstantial evidence that would buttress a claim of politically motivated conduct. However, that evidence consists of a hearsay statement by Coey that Mayor Keys "was very upset" that Hartsel had supported his opponent more than a year earlier, and the district court concluded that this was a mere scintilla which was refuted by the weight of contrary

---

[5] In *Kline*, the defendant contradicted himself on a material issue: he claimed that he used a draft job description in concluding that the plaintiff was not suited for the position, then twice stated during an EEOC investigation that the job description had been destroyed. *Kline*, at 4. In contrast, the testimony of Keys and other witnesses consistently supports their claim that computer skills were relevant to the superintendent's job.

evidence.[6] Hartsel also points to a conclusory affidavit of Joe Grace, which alleges that "[b]ased on my experience and observations of the decisions made by [Keys], I believe [his] decision not to appoint Ila Hartsel permanently to [Superintendent] was politically motivated."

Hartsel correctly notes that if a plaintiff produces evidence that her protected expression[7] was a "substantial" or "motivating" factor in a defendant's decision to terminate employment, the burden of proof shifts to the defendant to prove that it would have made the same decision in the absence of the protected conduct. *Mount Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Matulin v. Village of Lodi*, 862 F.2d 609, 613 (6th Cir. 1988). Usually, the question of causation is a factual issue to be resolved by a jury, *Matulin*, 862 F.2d at 613, and may be satisfied by circumstantial evidence. *Langford v. Lane*, 921 F.2d 677, 683 (6th Cir. 1991) (quoting *Conklin v. Lovely*, 834 F.2d 543, 546-47 (6th Cir. 1987)). Nonetheless, a court may grant summary judgment even in a causation inquiry, where it is warranted.[8] *Langford*, 921 F.2d at 683-84.

---

[6] In contrast, Brand was active in the state Democratic Party and had supported Keys in 1984 and 1988, performing routine campaign functions and attending some five-to fifteen-dollar-a-plate fundraising dinners.

[7] Hartsel's conduct is protected by the First Amendment because a mayor's election campaign is a matter of public concern, thus satisfying Doyle's first requirement. *Mount Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

[8] For instance, in *Langford*, a nursing home employee was fired for insubordination after speaking out against her

In this case, Hartsel has not shown that her support of Billy Grace in the May 1991 mayor's race at the debate was a substantial or motivating factor in Keys's decision to select a candidate with computer experience and proficiency, and therefore she has not carried her initial burden of proof. Hartsel's case hinges upon her claim that Coey told her in the fall of 1992 that the mayor was upset that she had supported Billy Grace. Coey does not remember such a remark, although he stated that he could have said it; Mayor Keys denies discussing Hartsel's political activity on Grace's behalf with anybody, and he was unsure whether he was even aware of her involvement. In any event, Hartsel's statement as to the content of Coey's comment must be disregarded, as being inadmissible hearsay. It is a statement being offered for the truth of the matter asserted, i.e., to show that Mayor Keys truly "was very upset" by Hartsel's political activity. *Wiley*, 20 F.3d at 225-26; Rule 56(e), Fed. R. Civ. P.; *State Mut. Life Assur. Co. v. Deer Creek Park*, 612 F.2d 259, 264 (6th Cir. 1979).

Moreover, the chronology of events in this case weakens Hartsel's claim of a grudge by Keys. Mayor Keys promoted Hartsel to acting Superintendent in May

---

supervisor at a public meeting. The evidence was undisputed that the employee had repeatedly clashed with co-workers and that two days before the public meeting she had refused to meet with the supervisor to discuss her grievances, which constituted insubordination. Because the court concluded that her supervisor could have fired her at any time, the plaintiff could show no disputed issue of material fact concerning her discharge, and the court granted summary judgment for the defendants.

1992, with an attendant raise of $13,000 per year, a year after the primary campaign against Billy Grace. Hartsel points to *no* actions or statements of Keys that indicate he held any grudge against her in the intervening time. Then, several months later, but before Joe Grace's resignation due to health problems, Coey purportedly told her that the Mayor was very upset with her. A couple of months later, Hartsel is passed over for promotion due to her lack of computer skills. Keys would be a shrewd and extravagant politician indeed to cover his tracks by promoting and rewarding the target of his ire while simultaneously fabricating an alibi premised on computerizing the Utilities Department. The district court appropriately deemed Coey's purported remark as at most a scintilla of evidence incapable of staving off summary judgment.

Even if we assume that Hartsel satisfied her threshold requirement of evidence of a substantial or motivating factor, so that the defendants must prove that they would have made the same decision in the absence of Hartsel's protected conduct, we believe that the defendants have met this burden. The decision to value a strong understanding of computers over other possible professional skills is a quintessential example of a business judgment, which must be respected if there is evidence to support its legitimacy. In this case, there is no dispute that the Utilities Department purchased a $165,000 computer system and indeed carried out a computerization program, and that Brand was integral in computerizing two other city departments and had familiarity with the system proposed for implementation. In contrast, Hartsel's cursory knowledge of computers left her dependent upon subordinate personnel, and thus an

inappropriate choice to *lead* an expensive and expansive restructuring of the department's computer system. Hartsel admits that Mayor Keys was aware of her minimal computer skills. Although Hartsel may have been capable of *operating* a computer system, she has never contended that she personally possessed the skills for supervising such an upgrade. Instead, Hartsel has consistently argued that she could use the computer skills of other employees to achieve the computerization, and that her familiarity with the department's rules and day-to-day operation was more important than computer proficiency.

Thus, summary judgment is appropriate where, as in *Langford*, "a reasonable jury could not fail to conclude from the uncontested evidence that [plaintiff] . . . would have fired her even if she had not [engaged in the protected conduct]." 921 F.2d at 683. The district court reached the same conclusion in this case, placing particular emphasis on the timing of Hartsel's endorsement of Keys's opponent and the later dispute. Keys's intervening elevation of Hartsel and concomitant $13,000 raise weaken her claim of a grudge,[9] especially where her

---

[9] This circuit has recently endorsed the "same actor inference," which allows an inference of a lack of discriminatory animus where the same person is responsible for both hiring and firing the individual. *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461 (6th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 785, 133 L.Ed.2d 736 (1996). This rationale seems applicable to Keys's decision to promote Hartsel temporarily but later find her lacking for the permanent position. It " . . . hardly makes sense to hire workers from a group one dislikes . . . only to fire them once they are on the job." *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991) (quotation omitted). Likewise, if Keys held a discriminatory animus to Hartsel because she was female, 62

accusation is based on an inadmissible single alleged remark by Coey and where the evidence of her lack of qualifications is so overwhelming.

We similarly disregard the affidavit of Joe Grace because it consists of subjective allegations and vague, conclusory allegations such as "I have witnessed many decisions made by Mayor Michael Keys regarding appointments, personnel, budgeting, funding and the purchase of new equipment. I believe those decisions . . . usually were based on [ ] political considerations." We also note that Grace's affidavit fails to link the purported "political" nature of Mayor Keys's decision-making process to Ila Hartsel's particular grievance, beyond his opinion that Hartsel was "more qualified for the job than Tom Brand." If this document were sufficient to preclude summary judgment, than [sic] every employee who failed to support Keys in an election would be able to get any claim of "politically motivated" job discrimination before a jury.

Furthermore, a civil servant is not allowed to immunize herself from being fired or denied a promotion by supporting an unpopular cause or losing candidate. As the Supreme Court noted in *Doyle*, "[a] borderline or marginal candidate . . . ought not to be able, by engaging in [protected] conduct, to prevent his employer from assessing his performance record and reaching a decision

---

years old, and supported his opponent in the primary, very little had happened to change that bias between the time he promoted her and his choice of Brand less than eight months later. The passage of time between those two events is a relevant factor in weighing the inference, *Buhrmaster*, 61 F.3d at 464.

not to rehire on the basis of that record." 429 U.S. at 285-86, *quoted in Langford*, 921 F.2d at 683.

Finally, Hartsel argues that by returning Hartsel to her prior position as office manager before accepting her resignation, Keys acted in a retaliatory fashion. She may be right – Keys might have been angered by her sudden and unexpected resignation – but again, there is no evidence that ties the "demotion" to her protected conduct endorsing Bill Grace almost two years before, or relating Keys's action to Hartsel's gender or age. Nor has Hartsel produced any evidence that this practice is out of the ordinary, or has been applied only to women or Democrats. Significantly, Keys took this step *after* she resigned, so it can hardly have contributed to her alleged "constructive discharge." Since the evidence is uncontradicted that her role as superintendent was temporary, Keys was not required to calculate her twenty-three years of accrued sick and vacation time at the higher salary she earned for less than a year; doing so would be fiscally irresponsible, costing Elyria additional thousands of dollars[10] without any accompanying municipal benefit, other than Hartsel's goodwill.

VI

Because we hold that the district court properly concluded that the plaintiff failed to show that the defendants' proffered non-discriminatory justifications were

---

[10] Hartsel received $31,972.59 in backpay, based on 1161.98 hours of owed holiday, vacation, and sick time.

pretextual, and because the district court properly concluded that there was no more than a mere scintilla of evidence of politically motivated retaliation, we AFFIRM the district court's grant of summary judgment to the defendants.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ILA HARTSEL, Plaintiff, vs. MICHAEL B. KEYS and THE CITY OF ELYRIA, et al., Defendants.	)	Case No. 1:93CV1227 MEMORANDUM AND ORDER (Filed May 26, 1994)

ALDRICH, J.

Ila Hartsel brings this action against Michael B. Keys, the City of Elyria, and the City of Elyria Utilities Department (collectively, "Elyria"), alleging discrimination on the basis of gender, in violation of Title VII, 42 U.S.C. § 2000e *et seq.;* discrimination on the basis of age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.;* and violation of her rights under the first and fourteenth amendments to the United States Constitution through 42 U.S.C. § 1983, and Art. I, § 11 of the Ohio Constitution.

The defendants moved for summary judgment on all claims on January 31, 1994. Hartsel opposed the motion.

For the reasons stated below, this Court grants Elyria's motion for summary judgment (#16).

I. FACTS

A. Background

Ila Hartsel began working for the City of Elyria, Ohio, in March, 1969, as a clerk-typist in the public utilities department. In April, 1977, Hartsel became the office supervisor for the department. The superintendent of the public utilities Department from before 1969 until 1992 was Joe Grace. In early 1991, Hartsel performed many of the superintendent's functions when Grace was out of the office due to his wife's illness.

In the spring of 1991, Hartsel supported Billy Grace, Joe Grace's son, in a primary contest for mayor of Elyria, against defendant Mayor Michael Keys. Hartsel assisted with signs, called voters, and sat with the Grace family at a candidate debate. (Hartsel Aff.¶ 4). In the fall of 1992, Elyria Safety Service Director Tim Coey allegedly told Hartsel that Keys was very upset with her for working on Billy Grace's campaign. (Hartsel Depo. at 9).

In April, 1992, Joe Grace's health problems often kept him from the office. Around May 1, 1992, Hartsel was made Acting Superintendent during Grace's absence. The new position, which defendants allege was "temporary," resulted in a $13,000 raise in Hartsel's salary, from $32,000 to $45,000 per year.

Hartsel has no experience in computer programming. She did have experience inputting information, such as adjustments to billings, into the computer on a daily basis. (Hartsel Depo. at 18).

Joe Grace retired as Superintendent effective November 30, 1992. Hartsel expressed to Keys and Safety Service

Director Coey her interest in being appointed the new "Acting Superintendent pending civil service action," who in due course would become the new permanent superintendent under the civil service law.

Thomas Brand, who had been deputy auditor in the auditor's department since August, 1990, also expressed an interest in the superintendent position. Brand had been a precinct committeeman in the Democratic Party since 1979. He had supported Mayor Keys in the mayoral races in 1984 and 1988, putting together yard signs. He also may have attended five- to fifteen-dollar fund-raiser dinners for Keys in 1984 and 1988. (Brand Depo. at 86-87).

In the mid-1980s, Brand had been employed in the installment department connected to the Elyria municipal court. Between 1984 and 1986, Brand and others demonstrated to the city administration the benefits of computerizing the installment department. With the help of Joe Grace, the public utilities superintendent, and others in the public utilities department who did programming, Brand successfully computerized the installment department. (Brand Depo. at 20-25). Sometime around 1988, Brand began a project to computerize the whole municipal court. Brand surveyed employees for their needs, and arranged demonstrations of available software meeting those needs. (*Id.* at 22-26). Eventually, Brand wrote the specifications for new software for the court, in order to prepare to accept bids from potential software suppliers. (*Id.* at 28). When the software was selected, Brand was sent to training to learn to operate the Hewlett-Packard system on which the new software would operate. (*Id.* at 35).

B. Hartsel's Resignation/Reclassification

Mayor Keys had told Hartsel he would make a final decision as to the acting superintendent around the first of the year. (Hartsel Depo. at 23). Around December 21, 1993, Hartsel met with Mayor Keys and discussed the position. Keys told Hartsel he had not made up his mind for sure, but said three times during that conversation that he was "99% sure" he was going to select someone with more computer experience than Hartsel. (*Id.* at 16; 23). Keys told Hartsel he hoped she stayed at the department because of her knowledge and experience. (*Id.* at 16). Hartsel testified that Keys told her they wanted her "to stay and help the new man."

Around the same time, Hartsel had heard through the office "grapevine" that Keys was going to select Thomas Brand. (*Id.* at 21). Hartsel considered the rumor and her conversation with Keys over the Christmas holiday. Hartsel knew that if she were not selected as the new acting superintendent pending civil service action, she would be returned to her position as office supervisor. She also assumed that she would have to train her replacement, although no one actually told her she would have to train the appointee. (*Id.* at 30-31). She decided that she could not continue in the acting superintendent position, given her inevitable return to her former position with a lower salary, and her assumptions that she would be asked to do the same work she was currently doing and to train the new person. (*Id.* at 30; Hartsel Aff. ¶¶ 5-6).

At 9:45 a.m. on December 31, 1992, Hartsel gave Keys a letter notifying him that she would resign her employment with the City of Elyria effective midnight, December 31, 1992. (*See* Brief in Oppositon Exh. 4). Keys accepted the resignation at 10:00 a.m. by letter. (*See* Brief in Opposition Exh. 5). Keys wrote Hartsel another letter at 11:40 a.m., which indicated that Keys had terminated Hartsel's "temporary re-classification of Acting Superintendent and reassign[ed]" Hartsel to her previous position as Office Supervisor, effective at 11:00 a.m. The same letter indicated that Keys had appointed Thomas Brand as acting superintendent of the Public Utilities Department, pending civil service action.

Keys testified that he reclassified Hartsel, and appointed Brand, effective 11:00 a.m. because he was concerned about the effective operation of the department. (Keys Depo. at 71-72). December 31 was a half-day in the city offices, and was followed by a long weekend. (*See* Coey Depo. at 39). Keys and Coey were concerned about leaving Hartsel in charge after the building would be closed, given that she had resigned after 20 years of employment with hardly any notice, and had returned her keys to the building. (Coey Depo. at 40).

Several months after Tom Brand's appointment, the administration approved Brand's request for funding to purchase an IBM AS 400 computer system costing over $100,000. Joe Grace had recommended that the city purchase a scaled-down version of the same computer system several times in the late 1980s. The administration had not approved those requests. (*See* Joe Grace Aff. ¶¶ 11-12). Ila Hartsel also unsuccessfully requested funding for a new system in 1992. Mary Grace Aff. ¶ 10. Keys

testified that many of the computerization recommendations which are now being addressed in the public utilities department are based on a study done when Joe Grace was superintendent. Keys Depo. at 35-37. According to Keys, it has been "common knowledge" for several years that the public utilities computer system needed updating. *Id.*

II. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .

The nature of materials properly presented in a summary judgment pleading is set forth in Federal Rule of Civil Procedure 56(e):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an

> adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In reviewing summary judgment motions, this Court must view the evidence in the light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Assn., Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252.

III. LAW

A. Title VII

The Supreme Court has recently reaffirmed and clarified the application in Title VII cases of the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *See St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). In a Title VII case alleging disparate treatment based on gender, a plaintiff establishes a *prima facie* case, and raises a presumption of discrimination by showing: (1) that she was within the protected class; (2) that she was the subject of adverse employment action; (3) that she was qualified for the position; and (4) that the person who was given the position is outside of the protected class.

If the plaintiff establishes a *prima facie* case, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the employer's actions. If the defendant offers such a legitimate reason, the presumption raised by the *prima facie* case is rebutted. *See Hicks*, 113 S. Ct. at 2748-49. The burden of proof, which always remains on the plaintiff, then requires the plaintiff to offer evidence that the reason proffered by the defendant is actually a pretext for impermissible discrimination. *Id.*

Evidence creating a fact issue as to the believability of the reasons offered by the defendant, "may, together with the elements of the *prima facie* case, suffice to show intentional discrimination." *Id.* at 2749. Thus under *Hicks*, summary judgment for the defendant is inappropriate if the plaintiff produces evidence which, if believed, shows

a "legitimate" reason to be a mere pretext for intentional discrimination.

B. ADEA

The ADEA provides in pertinent part:

> It shall be unlawful for an employer –
>
> (1) to . . . discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . .

29 U.S.C. § 623(a). A plaintiff raises the presumption of discrimination by showing that:

(1) she was a member of the protected class (age 40 to 70);

(2) she was subjected to adverse employment action;

(3) she was qualified for the position; and

(4) she was replaced by a younger person.

Simpson v. Midland-Ross Corp., 823 F.2d 937, 940 (6th Cir. 1987) (relying on *McDonnell Douglas*, 411 U.S. 792 (1973)). "Proof of the four *McDonnell Douglas* elements or other direct or statistical proof raises a rebuttable presumption of discrimination. As in the case of gender discrimination, the burden of production then shifts to the defendant employer to provide a legitimate nondiscriminatory reason for the action taken." *Simpson*, 823 F.2d at 940. The employee then bears the burden of showing that the

proffered reason was not the true reason for the employment decision, and that the real reason was the discriminatory motive. *Id.; see also Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 312-14 (6th Cir. 1989).

The *McDonnell Douglas* approach is not mechanistically applied in the Sixth Circuit in ADEA cases. *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1179 (6th Cir. 1983). The ultimate issue in age discrimination cases is whether age was a determining factor in the employer's decision. *Id.* at 1180. This is determined through a case-by-case approach to avoid interfering with the employer's legitimate business decisions. *Id.* at 1179; *see also Laugesen v. Anaconda*, 510 F.2d 307 (6th Cir. 1975).

C. Free Speech Claims

To prevail on a claim of adverse employment action in violation of the first amendment to the United States Constitution, a public employee must first offer evidence which shows that her protected expression played a substantial part, or in other words was a "motivating factor," in the employer's adverse decision. *Mount Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977). Once the plaintiff shows that her expression was a motivating factor behind the employer's decision, the employer has the opportunity to prove, by a preponderance of the evidence, that it would have made the same decision in the absence of the protected conduct. *Id.*

Promotions, transfers, and recalls after layoffs, as well as dismissals, if based on political affiliation or expression, are impermissible infringements on first

amendment rights. *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, 2737 (1990).

Although Hartsel's complaint contains a claim for a violation of her free speech rights under article I, section 11 of the Ohio Constitution, neither party addresses that claim separately in its summary judgment pleadings. This Court, moreover, is skeptical that Hartsel, a public employee protected by a civil service classification scheme, is without "other reasonably satisfactory remedies provided by statutory enactment and administrative process," which would bar a private cause of action to enforce Ohio Constitutional rights. *See Provens v. Stark County Bd. of Mental Retardation & Dev. Disabilities*, 64 Ohio St. 3d 252, 594 N.E.2d 959, Syllabus (1992).

To the extent that Hartsel *can* pursue her article I, section 11 claim, this Court finds that the Ohio Supreme Court would interpret such a claim consistently with the United States Constitution's free speech protections. Although this Court finds no case law describing the standard governing a political retaliation claim, Ohio courts in other contexts have consistently interpreted the protections of Ohio Constitution's free speech clause as co-extensive with those of the first amendment to the United States Constitution. *See, e.g., In re T.R.*, 52 Ohio St. 3d 6, 556 N.E. 2d 439, Syllabus ¶ 2 (1990) (press access to court proceedings); *City of Urbana ex rel. Newlin v. Downing, et al.*, 43 Ohio St. 3d 109, 539 N.E.2d 140 (1989) (obscenity); *City of Cleveland v. Sundermeier*, 48 Ohio App. 3d 204, 207, 549 N.E.2d 561, 564 (1989) (handbilling on private property); *Milkovich v. News-Herald*, 70 Ohio App. 3d 480, 591 N.E.2d 394 (1990) (defamation).

Thus this Court will interpret Hartsel's free speech claims under the Ohio Constitution consistently with the federal free speech claim.

IV. PLAINTIFF'S CLAIMS.

A. Gender and Age Discrimination

Hartsel alleges that the failure to promote her to the position of acting superintendent pending civil service action, as well as the "constructive discharge" and *de facto* "demotion" which resulted from the failure to promote, constituted illegal discrimination based on Hartsel's gender and age.

Elyria insists that Hartsel's resignation, which indisputably preceded the formal promotion of Thomas Brand, was not the result of a constructive discharge. Thus, Elyria contends, Hartsel was never subject to an adverse employment decision, and cannot establish a *prima facie* case of gender or age discrimination. This Court need not reach the question of whether the conditions of Hartsel's employment amounted to a constructive discharge. Even if Hartsel could establish a constructive discharge, and thus a *prima facie* case of discrimination relating to the denial of a promotion, this Court finds that the evidence proffered by Hartsel still fails to create a material fact issue precluding summary judgment.

In both gender and age cases in which the plaintiff has established a *prima facie* case, the defendant has the opportunity to offer a legitimate, non-discriminatory reason for its actions. Here, Elyria has offered such a reason: the city sought a new superintendent with computer

skills necessary to assist in the upgrade of the computers in the Public Utilities Department.

The evidence supports Elyria's justification. Mayor Keys testified it was "common knowledge" that the department needed a new system; Tim Coey characterized the necessary changes as going from the "Stone Age," "basically almost replacing the system." Keys Depo, at 36; Coey Depo. at 21-22. Coey testified that he and Keys felt they needed someone who could come in, study the department, its current computer programming and software, and recommend which changes in equipment and software should be implemented. Coey Depo. at 26. Hartsel, in fact, points repeatedly to the study of the department's computer needs put together in the late 1980s by Joe Grace, indicating the need for upgrading and modernizing.

Hartsel and Keys both testified that Keys told Hartsel he felt a need for someone with a strong computer background. Keys Depo. at 27-28; Hartsel Depo. at 16. It is undisputed that Hartsel's computer experience consisted entirely of "keying in" or "inputting" information on a daily basis. Hartsel admitted that Keys knew she could not operate a computer "as [in] putting the programs on and all this type of thing." Hartsel Depo. at 17-18. Likewise, Hartsel does not dispute that when the promotion decision was made, Brand had more experience with computers than did Hartsel. Brand was instrumental in computerizing the installment department, and eventually the entire Elyria municipal court, in the mid-1980s. During the latter project, Brand surveyed employees, evaluated department computer needs, wrote specifications for the bids for a system, evaluated the bids, helped

select a software company, and was sent to train on the new computer system once it was selected. Hartsel offers no evidence whatsoever that she had similar experience in implementing the computerization of a city department.

Moreover, Hartsel herself proffers evidence showing that since Brand's appointment, the public utilities department has indeed purchased a very expensive computer system. Brand testified that when he recommended the purchase of the IBM AS400 system in May, 1993, he was unaware of Joe Grace's recommendation of the purchase of a smaller version of the system in the early 1990s. Brand Depo. at 47-48. It is undisputed that the department continues to implement changes to the computer system, some of which are based on the report coordinated by Joe Grace in the late 1980s and early 1990s.

Hartsel's attempts to create a fact issue showing that Elyria's justification is really pretext for discrimination are without merit. Hartsel first claims that the justification is pretext because Elyria's interests in computerization of the department are a recent development, given that Joe Grace's prior requests for funding were rejected. In fact, all the testimony indicates that it has been clear for years that the department would need computer modernization; Joe Grace's late-80s report *supports* the legitimacy of Elyria's justification.

The fact that the city did not approve funding for a system prior to the appointment of Brand does nothing to call into question the city's intention to implement a new system under a new superintendent. Hartsel does not

show discrimination in *her* promotion, or more precisely, the required pretext, by showing that Elyria for years ignored *Joe Grace's* suggestions. At issue is the legitimacy of the city's reasoning in late 1992, when they failed to promote Hartsel.

Likewise, the fact that Joe and Mary Grace, who were recommending the new system in the late 1980s, had more computer experience than Brand, does not demonstrate pretext. It might show the city demonstrated bad judgment in waiting for a new computer system; at the same time, it shows that someone more computer-skilled than Hartsel ran the public utilities department for years, *and* was available to assist other departments in their attempts at computerization. This Court does not find that Joe Grace's computer skills create a fact issue relating to the believability of Elyria's intention to computerize the department in 1992, or the relative computer skills of *Brand* as compared with *Hartsel*.

Hartsel in fact maintains that the city's focus on the relative computer skills of Brand and Hartsel itself goes to pretext. This Court disagrees. The fact that Hartsel may have been more qualified in *other* areas does not prevent Elyria from relying on a *particular* skill – in this case, computer experience – in its hiring decision. As long as the basis of the decision is supported by the facts, and is not a front for discrimination, this Court does not question the business judgment of the employer. *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1160 (6th Cir. 1990).

Hartsel maintains that the fact that Elyria never, in the past, required heads of departments implementing computerization to have computer skills, shows pretext.

She points out that Joe Grace routinely offered assistance to other department heads. She also points out that Tom Brand himself, when computerizing the installment department and municipal court, relied on the programmers from the public utilities department, and was sent to Hewlett Packard for training on the system. This evidence does not demonstrate pretext. First, ironically, the promotion at issue is to *replace* Joe Grace, the very computer resource who was available to department heads in the past during their computerization efforts. Second, Hartsel has not shown that the circumstances surrounding the computerization of the municipal court in 1988 are in any way similar to those surrounding the utilities department in 1992. More important, in the 1980s Elyria was not making a new appointment to head the installment department or municipal court during its computerization – it was merely offering support to those current employees who would be running the computerization. In this case, Elyria was choosing a superintendent for the future. There is nothing illegal about seeking a candidate with the skills necessary to best perform the tasks ahead. And third, once again, Hartsel's description of the leeway and assistance given to Tom Brand while he computerized the other departments does not change the undisputed fact that as of 1992, Tom Brand had had experience computerizing a department, and Ila Hartsel did not have similar experience.

Hartsel relies on *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176 (6th Cir. 1983), an age discrimination case under the ADEA, in claiming that Elyria's assumptions about Hartsel's computer skills are evidence of pretext. The facts in *Blackwell* are critically distinguishable from those here. In

Blackwell, the employer denied the older plaintiff's specific request to expand his sales territory, so that he could better meet sales goals. The employer than gave the younger employee who replaced the plaintiff the exact accommodation which it had denied the plaintiff. Here, there is no evidence that when the administration indicated it needed computer experience, Hartsel ever requested accommodation such as training. Likewise, there is no evidence that upon his appointment, Brand was given training which had been denied Hartsel. The fact that in the mid-1980s, the city offered training to Brand when he assisted in the computerization of another department, does not support the claim that in 1991, the city discriminated against Hartsel by selecting Brand, who had more computer experience, for the superintendent's position.

Hartsel also maintains that the fact that Mayor Keys and Tim Coey do not have advanced computer skills demonstrates pretext. The skills of *other* department heads, or even the mayor, have no relationship whatsoever to the job skills desirable in a superintendent of the public utilities department in 1992. The relevant question in the pretext analysis is the legitimacy of the skills relied upon in the superintendent hiring decision, and such information about other departments does nothing to inform the pretext analysis.

Hartsel asserts that statistical evidence constitutes circumstantial evidence of illegal discriminatory motive based on gender and age. However, the isolated fact that Elyria has sixteen departments, with only one female department head appointed by the Board of Health and not the mayor, does nothing to show discrimination. This

Court has no evidence of the number of women in those departments; who applied for the positions; whether any women were qualified applicants; or how long the positions have been held by the same individual (Joe Grace, for example, was superintendent of one department for 30 years). A mere lack of women, without any explanatory background facts, does not even suggest discrimination.[1]

In short, the evidence proffered by Hartsel, taken in a light most favorable to her, simply does not discredit Elyria's claims that (1) it intended to computerize the public utilities department under a new superintendent; (2) computer skills were therefore relevant in the selection of the new superintendent; and (3) in 1992, Brand had more experience with computers, and specifically with evaluating and implementing a new computer system in a city department. Under *Hicks*, evidence discrediting the justification of the employer creates a fact issue making summary judgment inappropriate. However, none of Hartsel's evidence tends to show that the defendant's legitimate reason for its decision is unworthy of belief, or that discrimination was more likely the reason for the decision; taking *all* of that evidence together does not change the equation here.

---

[1] Such a fact, without more, also does not approach enough evidence for a *disparate impact* claim. A *prima facie* claim of disparate impact requires a showing of causation – that is, that a particular isolated practice or requirement by the employer *causes* a statistically disparate impact on a particular group. *See Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992). Hartsel has made no such allegation or showing about a particular requirement for city employment.

Taking all the evidence most favorably to Hartsel, this Court holds that no reasonable jury could find that Elyria's proffered reason for not promoting Hartsel is a pretext for gender discrimination under Title VII, or age discrimination under the ADEA. Accordingly, this Court grants the defendants' motion for summary judgment on Hartsel's gender and age discrimination claims.

B. Free Speech Claims

Hartsel claims that her first amendment rights were violated when she was not given the promotion, and when in retaliation, she was reclassified to her permanent position hours before her resignation was effective. The free speech analysis is similar to the legitimate reason/pretext analysis in a discrimination case. Here, however, if the plaintiff establishes a *prima facie* case, the *burden of proof* shifts to the defendant to *prove* it would have made the same decision in the absence of the protected expression.

Hartsel has offered insufficient evidence for this Court to find that her political expression was a "motivating factor" in the decision not to appoint her.

Keys knew that Hartsel supported his opponent in the mayoral primary in 1991. Brand was a Keys supporter. Hartsel was passed over for the promotion in favor of Brand. Hartsel avers that Tim Coey, in the fall of 1992, told her that Keys was "very upset" with her for supporting Billy Grace's campaign in the spring, 1991, mayoral primary. However, the causal connection between any anger on the part of the mayor and the decision not to promote Hartsel is, if anything, extremely attenuated.

The mayoral primary was almost a year and a half before the employment decision at issue. In the interim, a year after the primary, Keys promoted Hartsel to the position of acting superintendent in Joe Grace's absence, which resulted in a raise equivalent to $13,000 a year.

Hartsel also offers in support of her claim of political retaliation the affidavit of Joe Grace, who asserts that it is his "belief" that several decisions by the mayor during *Grace*'s tenure were politically motivated. Grace's statements, unsupported by any facts such as incriminating comments by the mayor, or a comparison with the treatment of other employees, which might suggest a political motivation against him or anyone else, are sheer speculation and do not support Hartsel's claims.

This Court finds the isolated statement that Keys was "very upset" with Hartsel's support of Billy Grace to be a mere scintilla of evidence of retaliatory motivation, which does not meet the "substantial factor" test set out in *Doyle*. Such slim evidence does not suffice to create a material fact issue as to the claim that the promotion decision was in retaliation for Hartsel's political expression.

Moreover, even if Hartsel's slim evidence does meet the substantial factor test, she still does not survive a motion for summary judgment. This Court finds that despite the higher burden of proof applied to the defendants' justification in the first amendment framework, Elyria has proved that it would have made the same decision in the absence of Hartsel's expressive activity.

As discussed above, there is undisputed evidence that Elyria intended to computerize the public utilities

department; that Brand's experience in computerizing a department exceeded Hartsel's; and that the public utilities department did indeed undergo an expensive modernization of its computer system soon into Brand's tenure. Hartsel's own evidence shows that Elyria had been exploring for years the need for the computerization, and the fact that when other department heads computerized their offices, superintendent Joe Grace had been the one to assist them. Just as Hartsel's evidence failed to show pretext, it fails to establish a fact issue as to the motivation for Elyria's decision.

Hartsel's other first amendment claim that Keys's reclassifying her to her former position as office supervisor hours before her resignation was effective constituted political retaliation, also fails the "motivating factor" test. Hartsel offers no evidence at all, except her speculation, that Keys's action was really retaliation against her for her political beliefs. There is no direct evidence of an improper motivation, and no other situation involving the treatment of a resignation to which this Court can compare Hartsel's situation.

Moreover, Elyria has offered an unrebutted legitimate explanation for the reclassification. Both Keys and Coey testified that city hall was only open a half day on December 31, the day Hartsel resigned. Both testified they were concerned about leaving Hartsel in charge after the building closed, given that citizen complaints which required the superintendent's attention often came in after hours; Hartsel had resigned with almost no notice, for "peronal reasons," after twenty years of service; and Hartsel had turned in her keys to the building. It is in no way unbelievable that in such a situation, Hartsel's

reliability for the rest of the day would be questioned. Hartsel's only evidence "rebutting" the reclassification explanation is her assertion that there was no reason to doubt Hartsel's competence for those few hours, given her years of loyal service. Such an argument does not effectively rebut the defendants' justification.

Given the lack of any direct or circumstantial evidence supporting the first amendment claim based on Hartsel's reclassification, this Court holds that no reasonable jury could find in Hartsel's favor on her political retaliation claim surrounding her reclassification.

In short, Elyria has offered sufficient unrebutted evidence to prove that it would have made the same decisions, namely not to promote Hartsel, and to reclassify her on the morning of December 31, 1992, even in the absence of her political opposition to the mayor in mid-1991. Hartsel has offered insufficient evidence to all into question Elyria's non-political explanation for the promotion, and no evidence calling into question the explanation for the reclassification. Accordingly, this Court grants the defendants summary judgment on Hartsel's free speech claims based on both the first amendment, and article I, section 11 of the Ohio Constitution.

V. SUMMARY

In sum, this Court grants the defendants summary judgment as to the age and gender discrimination claims under Title VII and the ADEA.

This Court further grants the defendants summary judgment on the claims under the first amendment of the

United States Constitution and article I, section 11 of the Ohio Constitution.

This Court dismisses the complaint against all defendants. This order is final and appealable.

IT IS SO ORDERED.

/s/ Ann Aldrich
ANN ALDRICH
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ILA HARTSEL, Plaintiff, vs. MICHAEL B. KEYS and THE CITY OF ELYRIA, et al., Defendants.	Case No. 1:93CV1227 ORDER (Filed May 26, 1994)

ALDRICH, J.

The Court has filed its memorandum and order granting defendants' motion for summary judgment; therefore,

IT IS ORDERED that defendants' motion for summary judgment is granted; final judgment is entered in favor of the defendants; and the case is dismissed.

IT IS FURTHER ORDERED that this judgment is final and appealable.

/s/ Ann Aldrich
ANN ALDRICH
UNITED STATES
DISTRICT JUDGE

Age Discrimination in Employment Act of 1967,
29 U.S.C. §621, *et seq.*

§623: Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer –

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

29 U.S.C.S. §623(a)(1) (1996).

FED. R. CIV. P. 56(c)

Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party in entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

FED. R. CIV. P. 56(c) (West 1996)

Supreme Court, U.S.
FILED

96 486 SEP 24 1996

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

ILA HARTSEL,

Petitioner,

vs.

MICHAEL B. KEYS,
individually and in his capacity as
Mayor of the City of Elyria, Ohio, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

ELLEN SIMON SACKS
LANCIONE & SIMON, P.L.L.
1717 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
Telephone (216) 575-1002

Counsel of Record for the Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether defendants in an action brought under the Age Discrimination in Employment Act, as a matter of law, rebut the plaintiff's prima facie case of age discrimination though the articulation of a legitimate non-discriminatory business reason for the challenged employment action, when the proffered justification is closely correlated to a trait widely shared by older Americans, and the plaintiff thereafter presents credible evidence that the proffered reason is a pretext?

2. Does a district court err in granting summary judgment for the defendants in an action brought under the Age Discrimination in Employment Act, in keeping with what some courts have identified as a "pretext-plus" burden of proof, when the plaintiff has established a prima facie case of age discrimination, the defendants have proffered a legitimate non-discriminatory reason for the challenged employment action, and the plaintiff has offered probative reliable evidence that the defendants' proffered justification is a pretext for discrimination, without necessarily establishing direct evidence of discriminatory animus, as would be sufficient under a "pretext-only" analysis?

LIST OF PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The parties to the proceedings below were the petitioner Ila Hartsel and the respondents, Michael Keys, the City of Elyria, Ohio, and the Utilities Department of the City of Elyria, Ohio. In the United States Court of Appeals, the petitioner appeared as the plaintiff-appellant, while each of the respondents appeared as a defendant-appellee. Respondent Michael Keys was named as a defendant in the United States District Court both in his individual capacity and in his official capacity as the Mayor of the City of Elyria, Ohio.

No parent companies are parties to this action, nor are there any corporate entities which are nonwholly owned subsidiaries required to be listed under SUP. CT. R. 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND RULES AT ISSUE 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT OF CERTIORARI 9

I. The defendants in an action brought under the Age Discrimination in Employment Act should not be granted summary judgment when, to rebut the plaintiff's prima facie case of discrimination, the defendants proffer as a legitimate non-discriminatory reason for its action a characteristic widely shared by older Americans, and the plaintiff thereafter produces evidence of pretext 9

II. The Sixth Circuit's opinion is unclear as to the evidentiary burden which an ADEA plaintiff must meet, in response to the defendant's articulation of a non-discriminatory reason for her non-promotion, in order to survive summary judgment, and conflicts with the holdings of other circuits with respect to this burden 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994) 10, 15, 17

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 10

Bodenheimer v. PPG Indus., Inc., 5 F.3d 955 (5th Cir. 1993) 16

Dister v. Continental Group, Inc., 859 F.2d 1108 (2d Cir. 1988) 7

Durham v. Xerox Corp., 18 F.3d 836 (10th Cir. 1994) 16

EEOC v. Wyoming, 460 U.S. 226 (1983) 12

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968) 10

Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104 (8th Cir. 1994) 15

Hairston v. Gainesville Sun Publ. Co., 9 F.3d 913 (11th Cir. 1993) 15

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) .. 11, 12, 13

LeBlanc v. Great American Insurance Co., 6 F.3d 836 (1st Cir. 1993) 16

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ..... *passim*

Mitchell v. Data General Corp., 12 F.3d 1310 (4th Cir. 1993) 15

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) ..... *passim*

Saulpaugh v. Monroe Community Hosp., 4 F.3d 134 (2d Cir. 1993) 16

TABLE OF AUTHORITIES – Continued

Page

Shager v. Upjohn Co, 913 F.2d 398 (7th Cir. 1990) 10

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) ..... *passim*

U.S. Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711 (1983) 9, 13

Waldron v. SL Industries, Inc., 849 F. Supp. 996 (D.N.J.1994) 16

Washington v. Garrett, 10 F.3d 1421 (9th Cir. 1993) 15

Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) 12

Western Airlines, Inc. v. Criswell, 472 U.S. 400 (1985) 12

STATUTES AND RULES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 5

28 U.S.C. § 1337 5

28 U.S.C. § 1343 5

29 U.S.C. § 621, *et seq* 1, 2, 4

42 U.S.C. § 1983 .....1, 4

42 U.S.C. § 2000e, *et seq* 1, 4

SECONDARY AUTHORITIES

Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991)..... 14

PETITION FOR WRIT OF CERTIORARI

Petitioner Ila Hartsel respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceedings on June 26, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 87 F.3d 795 (6th Cir. 1996), and is reprinted in the appendix hereto at page A-1. The memorandum decision of the United States District Court for the Northern District of Ohio (Aldrich, J.) has not been reported. It is reprinted in the appendix hereto at page A-23.

JURISDICTION

Invoking federal jurisdiction under the Civil Rights Act of 1964, As Amended, 42 U.S.C. § 2000e, *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, and the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983, the petitioner brought this action in the United States District Court for the Northern District of Ohio. The respondents moved for summary judgment with respect to each of these claims, and on May 26, 1994, the District Court granted their motion. (App.2, App.23).

Petitioner timely appealed the entry of summary judgment against her to the United States Court of

Appeals for the Sixth Circuit. On June 26, 1996, the Sixth Circuit affirmed the judgment of the district court, upholding the entry of summary judgment against the petitioner. (App.1). No petition for rehearing was filed.

The jurisdiction of this Court to review the June 26, 1996 judgment of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES AT ISSUE

Relevant portions of the Age Discrimination and Employment Act, 29 U.S.C. § 621, *et seq.*, and of FED. R. CIV. P. 56 are reprinted in the appendix to this petition, beginning at pages App.47 and App.48, respectively.

STATEMENT OF THE CASE

In March 1969, Petitioner Ila Hartsel began working as a clerk for the utilities department of the City of Elyria, Ohio. She became the department's office supervisor in April 1977, serving under Joe Grace, who had been the Superintendent of the department since 1969, and who would remain superintendent until 1992. (App.24). In early 1992, Grace took time off work to care for his ailing wife. In his absence, many of his job duties were performed by Hartsel. (App.24). In April 1992, Grace took time off work due to his own illness, and Hartsel increasingly performed his duties. In May 1992, Hartsel was

appointed Acting Superintendent of the utilities department. (App.24).

When Joe Grace finally resigned his position in November 1992, Hartsel expressed her interest in being permanently appointed Superintendent, informing both Safety-Service Director Tim Coey, and later Mayor Michael Keys of her desire. (App.24-5). Keys deferred his decision until late December, when he told Hartsel that he was "ninety-nine percent certain" that he would choose someone else to head the department on a permanent basis. (App.26). The Mayor also expressed his hope that Hartsel would remain on staff to help train the permanent Superintendent. Hartsel considered this, and rumors regarding her own replacement over the Christmas holiday. Convinced she would be returned to her prior position, while being required to perform the same duties, and train her replacement, for less pay, Hartsel submitted her resignation on the morning of December 31, 1992. (App.26-7).

Mayor Keys accepted the written resignation, effective at midnight, in a letter drafted within minutes of his receiving Hartsel's notice. Then, less than two hours later, the Mayor demoted Hartsel to her former position – office manager – ostensibly over concerns about the effective operation of the utilities department during the upcoming holiday weekend. (App.27). The record below established that Hartsel's eleventh hour reduction in grade cost her thousands of dollars, as years of accumulated sick and vacation time, for which she was entitled to payment, were calculated based on a salary some Thirteen Thousand Dollars ($13,000.00) less than she has

earned as Acting Superintendent. By midmorning, Hartsel had been replaced as Acting Superintendent by Thomas Brand. (App.27).

Brand was forty-two years old, and had no prior experience in the utilities department. Hartsel, who was sixty-two years old, had worked in the department for twenty-three years, had managed the utilities department office for fifteen years, and had performed the Superintendent's duties for nearly a year, capably and without criticism, when Brand was appointed.

Hartsel brought suit in District Court, alleging discrimination based on age, gender and retaliation for her involvement in the campaign of one of the mayor's electoral rivals. (App.1-2).[1] Seeking relief under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, Title VII of the Civil Rights Act of 1964, As Amended, 42 U.S.C. § 2000e, *et seq.*, and the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983, Hartsel invoked the District Court's

---

[1] Hartsel had been involved with the campaign of Billy Grace, son of Joe Grace, and an opponent of Mayor Keys in the 1991 primary election. (App.24). In the fall of 1992, Hartsel was told by Tim Coey that the mayor was still "very upset" over her involvement in the Grace campaign. Hartsel alleged that the mayor's failure to install her as Superintendent was motivated in part by a desire to retaliate against her for that involvement, in violation of her rights under the First and Fourteenth Amendments to the United States Constitution, and Article I § 11 of the Ohio Constitution. (App.32-3, App.41). Neither Hartsel's retaliation claim under 42 U.S.C. § 1983, nor her gender discrimination claim under 42 U.S.C. § 2000e *et seq.*, is implicated herein.

jurisdiction under 28 U.S.C. §§ 1331, 1337 and 1343. The defendants moved for summary judgment with respect to each of her claims.

The district court did not reach the question of whether Hartsel's non-promotion had amounted to a constructive discharge (App.34), and for purposes of granting summary judgment for the defendants, assumed that Hartsel had made a *prima facie* case of age discrimination under the familiar analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and later clarified in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (App.30, App.34). The Court of Appeals left that conclusion intact (App.9) and with respect to Hartsel's age discrimination claim focused upon the persuasiveness of the evidence which she had articulated in response to the proffered reason for her non-promotion: a lack of computer skills, in light of what the defendants claimed was an imminent upgrade of the utilities department's computer system. (App.9-10).

The District Court had deemed the "computer skills" justification to be a legitimate and non-discriminatory reason for Hartsel's non-promotion (App.30, App.35), and the Sixth Circuit agreed (App.10). The questions presented herein for review, however, arise from the standard of proof which the lower courts placed upon Hartsel after concluding that she had made a *prima facie* case of discrimination, and that the respondents had met the burden of production imposed on them by the second step of the *McDonnell-Burdine* analysis. The precise scope of that burden is unclear from the opinions below, which contradict each other, and in places, themselves.

The District Court held that, once the respondents had articulated a non-discriminatory reason for the challenged employment action:

> [t]he employee then bears the burden of showing that the preferred reason was not the true reason for the employment decision, ***and*** that the real reason was the discriminatory motive.

(App.31-2) (emphasis added). Later in the same opinion, the District Court articulated a substantially different standard. Relying upon this Court's then-recent decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the court explained its grant of summary judgment thus:

> Under *Hicks*, evidence discrediting the justification of the employer creates a fact issue making summary judgment inappropriate.

(App.40). That these are different standards is self-evident. Under the first, the plaintiff needs to present evidence both that the defendant's proferred justification for its actions is pretextual, ***and*** that the defendant's actual motive was discriminatory, in order to present a triable question of fact. Under the second, the plaintiff need only present credible evidence that the proffered reason was pretextual in order to reach a jury.

On appeal, the Sixth Circuit's analysis presented a similar lack of precision with respect to the burden ADEA plaintiffs face once their employer has offered a seemingly legitimate justification for a challenged employment action. Relying on *Hicks*, that court held that:

> Once the *prima facie* case is made, the defendant may offer any legitimate, non-discriminatory reason for the employment action, which the

> plaintiff may rebut by evidence of pretext; however the burden of proof always remains with the plaintiff.
>
> * * *
>
> Hartsel's failure to produce direct evidence of either pretext or discriminatory animus is fatal.

(App.9, App.12). This leaves unresolved the larger question of whether the rebuttal of the proffered justification is, in itself, sufficient to permit the plaintiff to withstand summary judgment at this stage of the *McDonnell-Burdine* analysis. The Court of Appeals noted that summary judgement is not appropriate every time an employer offers its business judgment (about the relative worth of job candidates) to rebut the presumption raised by a plaintiff's *prima facie* case, and explained that:

> [f]acts may exist from which a reasonable jury could conclude that the employer's business decision was so lacking in merit as to call into question its genuineness.

(App.10) (*quoting*: *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988), *cert. denied*, 115 S.Ct. 80 (1994)). Unresolved by this analysis is whether those facts, on their own, are sufficient to permit the plaintiff to withstand summary judgment, or whether additional facts tending to support a discriminatory animus are also necessary at this stage of production and proof.

Hartsel ***did*** adduce facts in the District Court which might have lead a jury to believe that the decision not to promote her was unrelated to her computer skills. That evidence included proof that other city departments had experienced successful computer upgrades under the

leadership of superintendents with skills not substantially greater than her own; that extra-departmental personnel were used to assist in the implementation of upgrades in other departments; that the technical assessments of hardware Hartsel was supposedly unqualified to make had already largely been made by the time the city decided not to promote her, and; that she was not offered an opportunity to receive training in computer skills, as her successor had been when he first oversaw a departmental computer upgrade. Hartsel also argued below that the computer skills in question were of a sort more commonly possessed by younger employees, and that this in itself raised the prospect of pretext.

Despite this evidence, the District Court concluded that Hartsel could not, as a matter of law, establish that:

> the defendant's legitimate reason for its decision is unworthy of belief, or that discrimination was more likely the reason for the decision. . . .

(App.40). The Sixth Circuit affirmed, and specifically rejected Hartsel's argument that the reliance on computer skills by the city in itself raised the prospect of pretext. (App.13).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

The defendant in an action brought under the Age Discrimination in Employment Act should not be granted summary judgment when, to rebut the plaintiff's *prima facie* case of discrimination, the defendant proffers as a legitimate non-discriminatory reason for its action a characteristic widely shared by older Americans, and the plaintiff thereafter produces evidence of pretext.

Under the familiar burden-shifting framework of *McDonnell Douglas* and *Burdine*, the plaintiff in an ADEA case bears the burden of establishing a *prima facie* case of discrimination, after which the defendant bears the burden of articulating a legitimate, non-discriminatory reason for the challenged employment action. Once the defendant has offered such a reason for the challenged employment action, the plaintiff is entitled to an "opportunity to demonstrate that the proffered reason for the employment decision was not the true reason for the employment decision" but a pretext. *U.S. Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711, 716 (1983) (*quoting Burdine*, 450 U.S. at 256).

In *Hicks*, this Court made clear that a plaintiff ***could*** survive summary judgment in the third phase of the *McDonnell-Burdine* analysis simply by introducing evidence from which a jury could conclude that the defendant's proffered justification was pretextual:

> The fact finder's disbelief of the reasons put forward by the defendant (particularly if that disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the

> prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's preferred reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, [n]o additional proof of discrimination is *required*. . . .

Hicks, 509 U.S. at 511. Thus, under *Hicks*, a defendant's proffered justification may be self-defeating; if it may be perceived as false, that perception alone is enough to preserve the possibility of a plaintiff's verdict. While *Hicks* assesses the *McDonnell-Burdine* analysis in the context of trial, a plaintiff facing the same burden of rebuttal in the context of defending against a summary judgment motion should be judged by a more lenient standard of proof. *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994). Such plaintiffs must produce evidence from which the fact finder could conclude that the employer lied in rebutting her *prima facie* case. *Id.* (*citing Shager v. Upjohn Co.*, 912 F.2d 398, 401 (7th Cir. 1990).

Of course, the evidence upon which the plaintiff relies must present a *genuine* factual dispute, which mandates only evidence sufficient to require that the trier of fact "resolve the parties' differing versions of the truth at trial." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986) (*quoting First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968)).

That a genuine question of pretext is always material is clear from *Hicks*, since the rejection of the defendant's proffered rebuttal is in itself enough to sustain, as a matter of law, a finding of discrimination otherwise made

by the trier of fact. *Hicks*, 509 U.S. at 511, n.4. The question in this light is under what circumstances is a plaintiff entitled to present to the trier of fact her contention that the defendant's proffered rationale is pretextual. Petitioner contends that she be allowed to do so in any case in which the defendant's proffered justification identifies, as the basis of its decision, a trait widely shared by members of the protected class, and when the plaintiff produces probative and reliable evidence that the trait in question is not legitimately connected to the job at issue.

Petitioner does not seek review of this Court's teaching in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) that there as yet exists no recognized cause of action for disparate impact discrimination under the ADEA. Nor does the petitioner argue, in contravention of that decision, that the reliance upon a trait shared by older Americans (such as a comparative lack of computer skills) amounts to disparate treatment discrimination based solely upon the correlation between the asserted job criterion and the trait shared by the protected class. *Id.* at 612 (holding that discrimination based on a trait which positively correlates with age does not violate the ADEA unless the discriminatory animus was directed at age, and not the trait in question).

Rather, the petitioner suggests that when the defendant attempts to rebut a plaintiff's *prima facie* case of age discrimination by claiming that the plaintiff either has (or lacks) a trait which is widely shared (or widely lacked) by older Americans, a district court errs in granting the defendant summary judgment when the plaintiff has introduced credible evidence of pretext.

As this Court taught in *EEOC v. Wyoming*, 460 U.S. 226 (1983), age discrimination is based in large part on stereotypical views of what older workers can and cannot do, and is rarely motivated by the sort of overt discriminatory animus that occurs in other types of discrimination. *Id.* at 610-11. Under *Hazen*, the articulation of such a stereotypical view does not ***in itself*** amount to an admission of wrongful discrimination, since the plaintiff can only invoke the protection of the ADEA when age, and not a factor closely correlated with age, motivates the discrimination. *Hazen*, 507 U.S. at 611.

The articulation of such a motive does, without more, point up the possibility that the employer has "rel[ied] on age as a proxy for an employee's remaining characteristics," *Id.*, and failed to evaluate the protected older employee "on [her] merits and not on [her] age." *Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 422 (1985).

It is accordingly inappropriate for a court to grant summary judgment for a defendant who has relied upon such a justification, especially in cases such as this, where the plaintiff has produced credible evidence showing that the characteristic identified by the employer was unrelated to the job in question.

The *McDonnell-Burdine* framework is not in itself a substantive part of the law of employment discrimination, but is rather a "means of arranging the presentation of evidence," *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988) to aid in cases where questions of proof "tend to be difficult and sensitive," and seldom involve "eyewitness testimony" regarding the employer's motivations. *Aikens*, 460 U.S. at 716.

It is well-settled that the plaintiff may carry the burden of refuting the defendant's proffered rebuttal indirectly, by demonstrating that "the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. That burden may be met with direct or circumstantial evidence. Once the defendant has articulated a supposedly legitimate reason for the challenged employment action, the case should be evaluated with a new level of specificity, *Aikens*, 460 U.S. at 715.

Petitioner now argues that when a defendant's justification is self-evidently linked to the stereotypical images which attach to older workers, the focus sought by the *McDonnell-Burdine* approach to the evidence is not achieved. Rather, the articulation of such a reason – ***in and of itself*** – creates an issue for the finder of fact. The defendant whose rationale encompasses traits widely shared by the protected class calls into question, through such an assertion, whether it has in fact used age as a "proxy" for characteristics which are impermissibly and wrongly associated with age. That sort of substitution is forbidden under the ADEA. *Hazen*, 507 U.S. at 611. Petitioner does ***not*** assert that the mere identification, by the defendant, of such a motivation *compels* a finding of discrimination. Rather, petitioner merely argues that the reliance on such a justification precludes summary judgment for the defendant when the plaintiff has produced evidence of pretext.

The proposition preserves a plaintiff's burden to produce evidence in response to a defendant's proffered justification in keeping with *Hicks*, 509 U.S. at 510-11, while recognizing that, as a common-sense matter, certain proffered justifications are so self-evidently suspect that,

by their very nature, they present a question of pretext for the fact finder.

II.

The Sixth Circuit's opinion is unclear as to the evidentiary burden which an ADEA plaintiff must meet, in response to the defendant's articulation of a non-discriminatory reason for her non-promotion, in order to survive summary judgment, and conflicts with the holdings of other circuits with respect to this burden.

Prior to this Court's decision in *Hicks*, there was conflict among the Circuits as to whether a plaintiff in a discrimination action could survive summary judgment simply through the introduction of evidence that the defendant's proffered justification at the second stage of the *McDonnell-Burdine* analysis was a pretext. *See generally* Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS, L.J. 57 (1991) (collecting cases establishing conflict in the circuits with respect to the plaintiff's burden of proof after the defendant's rebuttal of the *prima facie* case). An essential point of contention was whether a plaintiff, confronted l y the articulation of a legitimate and non-discriminatory justification for a challenged employment action, could preserve a genuine issue of fact for trial simply by introducing evidence that the defendant's proffered reason was pretextual:

> Most of the courts of appeals [to have] considered the question . . . followed *Burdine* and . . . held that a plaintiff may prove pretext, and thus prove intentional discrimination, by

> showing that the reasons offered for the employment decision are untrue.

Id. at 65. By contrast, before *Hicks*:

> a significant minority of courts . . . reason[ed] that the plaintiff must produce some additional evidence to show not only that the employer has concealed some other reason by its pretextual explanation, but also that the reason concealed by the employer was intentional discrimination.

Id., at 66. Despite this Court's guidance in *Hicks*, the Circuit Courts appear to remain divided on this very issue. As succinctly summarized by one federal court:

> The circuits are divided on the issue of what proof must be presented by the plaintiff to avoid summary judgment under the standards outlined in [*Hicks*]. The Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits have found that, where the plaintiff establishes a prima facie case and raises a genuine issue of material fact as to whether the employer's explanation for its action is true, summary judgment is inappropriate. *See Mitchell v. Data General Corp.*, 12 F.3d 1310 (4th Cir. 1993); *Anderson v. Baxter*, 13 F.3d 1120 (7th Cir. 1994); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1994 WL 59826 (8th Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *Hairston v. Gainesville Sun Publ. Co.*, 9 F.3d 913, 921 (11th Cir. 1993); *but see Gaworski, supra*, at (Gibson, J., dissenting).
>
> * * *
>
> Other courts have required a more substantial showing on plaintiff's part. The First, Second, Fifth, and Tenth Circuits have required that the plaintiff demonstrate both that the employer's

> reasons are false and that the real reasons were discriminatory – the so-called "pretext-plus" standard. *See LeBlanc v. Great American Insurance Co.*, 6 F.3d 836 (1st Cir. 1993), *cert. denied*, 128 L. Ed. 2d 72, 1994 U.S. LEXIS 2691, 1994 WL 54360, 114 S. Ct. 1398 (1994); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134 (2d Cir. 1993); *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 957 (5th Cir. 1993); *Durham v. Xerox Corp.*, 18 F.3d 836, 1994 WL 55005 (10th Cir. 1994).

Waldron v. SL Industries, Inc., 849 F. Supp. 996, 1004-05 n.11 (D.N.J.1994), *rev'd, remanded* 56 F.3d 491 (3d Cir. 1995) (holding that the district court had improperly predicted that the Third Circuit would adopt a "pre-text plus" analysis after *Hicks*, and reversing summary judgment against the plaintiff accordingly). Significantly, the disparity between these standards is reflected in the opinions below. The District Court required the Petitioner to establish that "the proferred reason was not the true reason for the employment decision, and that the real reason was the discriminatory motive" (App.32). The Sixth Circuit, by contrast, affirmed the District Court's "pretext-plus" decision while itself holding that "[f]acts may exist from which a reasonable jury could conclude that the employer's business decision was so lacking in merit as to call into question its genuineness" (App.10).

It is with great assuredness that the Circuit Courts have cited *Hicks* for the contradictory propositions directly implicated in this case. *Compare Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993) (holding that discrimination must be proved both by the refutation of the employer's rebuttal justification for its employment actions and by positive evidence of a discriminatory

animus, and holding that *Hicks* had "put the issue to bed" with respect to that burden) *with Baxter Healthcare*, 13 F.3d at 1123 (holding that *Hicks* had adopted the Seventh Circuit's "pretext-only" rule over the "pretext-plus" analysis of the First Circuit).

In short, despite this Court's clear articulation in *Hicks* that no additional showing beyond proof of pretext is ***required*** to preserve a factual issue under the *McDonnell-Burdine* analysis, the Circuit Courts are as divided as they were before *Hicks* on the proper scope of the plaintiff's burden in that phase of the *McDonnell-Burdine* round of proofs.

CONCLUSION

When the defendant in an ADEA action rebuts the plaintiff's *prima facie* case by asserting that its challenged employment action was based upon a trait widely shared by older Americans, that justification in itself presents an issue of material fact which should preclude summary judgment if the plaintiff then produces credible evidence of pretext. Despite this Court's teaching in *Hicks*, the Circuit Courts, like the courts below, remain divided on whether proof of such pretext will in itself suffice to forfend summary judgment for the defendant. Because of the widespread division on this point, and the significant interest that ADEA litigants have in a uniform protection of their rights, the guidence of this Court is required to resolve the uncertainty regarding the plaintiff's burden in such cases.

Accordingly, the petitioner respectfully requests that this Court grant the petition for a writ of certiorari to review the opinion and judgment of the Sixth Circuit, or summarily reverse the ruling of the court below.

Respectfully submitted,

ELLEN SIMON SACKS
LANCIONE & SIMON, P.L.L.
1717 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
Telephone (216) 575-1002

Counsel of Record

No. 94-3693

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ILA HARTSEL, *Plaintiff-Appellant,* v. MICHAEL B. KEYS, individually and in his capacity as Mayor of the City of Elyria; the CITY OF ELYRIA, OHIO; and the CITY OF ELYRIA UTILITIES DEPARTMENT, *Defendants-Appellees.*	)	ON APPEAL from the United States District Court for the Northern District of Ohio

---

Decided and Filed June 26, 1996

Before: JONES and BOGGS, Circuit Judges; and CHURCHILL, District Judge.*

BOGGS, Circuit Judge. Ila Hartsel appeals the district court's grant of summary judgment for the defendants, the City of Elyria and the Elyria Utilities Department ("City") and Michael Keys, its mayor. Hartsel's suit arises from her failure to be promoted to Superintendent of the Utilities Department. She alleges discrimination on the

---

* The Honorable James P. Churchill, United States District Judge for the Eastern District of Michigan, sitting by designation.

basis of gender, in violation of Title VII, 42 U.S.C. § 2000e *et seq.*; discrimination on the basis of age, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*; and deprivation of her rights of speech and association under the First and Fourteenth Amendments to the United States Constitution and Article I, § 11 of the Ohio Constitution.

The defendants counter that Hartsel was not selected to be Superintendent because the City was about to implement a major computerization of the Utilities Department and that Hartsel had poor computer skills. The district court granted summary judgment for the defendants because Hartsel failed to demonstrate an issue of material fact sufficient to rebut defendants' legitimate, non-discriminatory reason for not promoting Hartsel. Hartsel timely appeals.

For the reasons that follow, we find that Hartsel has failed to produce more than a scintilla of evidence supporting her claims under her various theories. Accordingly, we affirm the district court's decision.

I

Hartsel started working in the Elyria Utilities Department as a clerk-typist in March 1969. In 1977, she was promoted to office supervisor, where she worked under Joe Grace, the utility department's superintendent. Grace held the position of superintendent from 1969 until 1992. In early 1991, Hartsel performed many of the superintendent's duties when Grace missed work due to his wife's illness. Hartsel continued to perform many of these

duties in April 1992, when Grace was absent due to his own poor health.

In the spring of 1991, Joe Grace's son, Billy, ran against Mayor Keys in a party primary election for mayor. Hartsel publicly supported Billy Grace and assisted the campaign with signs, calling voters, and sat with the Graces at a candidate debate. Keys defeated Grace in the May 1991 primary.

In 1992, Hartsel became uncomfortable fulfilling so many of Grace's duties in an unofficial capacity, and in late April 1992, she approached Safety-Service Director Tim Coey to discuss the problem of Grace's prolonged absence. After Coey discussed the issue with Mayor (and defendant) Michael Keys, she was promoted on May 1, 1992, to Acting Superintendent of the Utilities Department. The new position paid Hartsel approximately $13,000 more than her salary as office supervisor.

Hartsel claims that, in late 1992, Coey had told her that Keys "was very upset" when he saw her sitting with Bill Grace at a campaign debate; Coey does not remember such a conversation. Joe Grace officially resigned on November 30, 1992, and Hartsel expressed her desire to remain as superintendent permanently, first to Coey, and then to Keys. The mayor indicated that he expected to make a final decision on the appointment around the first of the new year.

Tom Brand, a forty-three-year-old deputy auditor in the city's auditing department, also expressed interest in the job. Brand, along with Grace, had played a major role in computerizing the installment department of Elyria's municipal court in 1986. In 1988, Brand had also played a

prominent role in computerizing the whole municipal court, which required him to write specifications for the new system and to demonstrate the software to the employees who would use it. Brand had acquired additional computer knowledge by attending adult education classes at night, and he received training from Hewlett-Packard in conjunction with his computerization of the municipal court.

Hartsel met with Mayor Keys on December 21, 1992, to discuss the situation. Hartsel alleges that, during the meeting, Keys said three times that he was "99% sure" that he was going to appoint somebody with more computer experience and that he wanted her to stay on "and help the new man" because of her experience and skills. Hartsel interpreted this to mean that she would have to train her replacement, although nobody ever told her as much. Keys and Hartsel also discussed her possible retirement plans.

Hartsel claimed that she had heard through the "grapevine rumor mill" over the next few days that Brand was to be promoted to superintendent. During her Christmas vacation, Hartsel stewed over this information, until she concluded that going back to her job as office supervisor and training a less-qualified replacement would be "intolerable." When she returned to work on December 31, 1992, Hartsel submitted a letter of resignation at 9:45 a.m., effective midnight. Keys accepted her resignation at 10:00 a.m., but at 11:40 a.m., he reassigned Hartsel to her prior position as office manager and appointed Brand as Acting Superintendent, effective 11:00 a.m. Keys later justified this decision on the basis that he wanted to maintain a chain of responsibility over

the building over the long New Year's weekend, that he was concerned about the abrupt nature of Hartsel's departure, and that Hartsel had returned her keys to the building. Coey was similarly "not thrilled about the idea of having an employee in charge who had after 20 some odd years of service given us a two-hour [sic] notice of resignation."

II

On June 10, 1993, Hartsel sued the City and Keys, claiming that the refusal to promote her to permanent Superintendent constituted a constructive discharge from her job. Defendants moved for summary judgment on January 31, 1994, and plaintiff filed motions and briefs in opposition. On May 27, 1994, the district court granted summary judgment for the defendants, and an appropriate order was entered on May 31, 1994.

Judge Aldrich granted summary judgment on the age and sex discrimination claims because Hartsel failed to create an issue of material fact sufficient to rebut defendants' legitimate, non-discriminatory reason for not promoting Hartsel – that "the city sought a new superintendent with computer skills necessary to assist in the upgrade of computers in the Public Utilities Department." The district court noted that Hartsel did not dispute that Brand was more experienced with computers, and "[t]here is nothing illegal about seeking a candidate with the skills necessary to best perform the tasks ahead." Memorandum and Order May 26, 1994, at 17. Indeed, Hartsel's evidence actually supported the defendants' claim that Brand was hired to implement a new

computer system – Elyria had purchased an expensive and complex computer and continues to implement the system. The court therefore granted summary judgment, finding that "none of Hartsel's evidence tends to show that the defendant's legitimate reason for its decision is unworthy of belief, or that discrimination was more likely the reason for the decision."[1] *Id.* at 19.

The district court also dismissed Hartsel's § 1983 claim of retaliatory discharge because she had "offered insufficient evidence for this Court to find that her political expression was a 'motivating factor' in the decision not to appoint her." *Id.* at 20. The district court described the causal connection between the mayoral primary in May 1991 and Keys's decision not to promote Hartsel in December 1992 as "extremely attenuated," particularly in light of his April 1992 decision to make her acting superintendent with a salary increase of $13,000. Hartsel's only evidence of discriminatory motive was Coey's alleged comment that Keys was upset with her, which the court discounted as a "mere scintilla of evidence" that would not prevent summary judgment. *Id.*, at 21.

III

This court reviews *de novo* the district court's grant of defendants' motion for summary judgment. *Baggs v.*

---

[1] The district court dismissed Hartsel's so-called "statistical evidence" that only one of Elyria's sixteen department heads is female, because she provided no background facts, such as the number of women in each department, and the sex and qualifications of applicants for the department head positions.

Eagle-Picher Industries, Inc., 957 F.2d 268, 271 (6th Cir.), *cert. denied*, 506 U.S. 975, 113 S.Ct. 466, 21 L.Ed.2d 374 (1992). This court must affirm the district court only if it determines that the pleadings, affidavits, and other submissions show "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When evaluating this appeal, this court must view the evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The moving party need not support its motion with evidence disproving the nonmoving party's claim, but need only " 'show[ ]' – that is, point[ ] out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The pivotal question is whether the party bearing the burden of proof has presented a jury question as to each element of its case. *Id.*, 477 U.S. at 322.

The plaintiff must present more than a mere scintilla of evidence in support of her position; the plaintiff must present "evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202(1986). Accordingly, hearsay evidence may not be considered on a motion for summary judgment. *Wiley v. United States*, 20 F.3d 222, 226 (6th Cir. 1994). "The 'mere possibility' of a factual dispute is not enough." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992) (*quoting Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 863 (6th Cir. 1986)). Accordingly, this standard requires a court to make a preliminary

assessment of the evidence, in order to decide whether the plaintiff's evidence concerns a material issue and is more than *de minimis*.

IV

As a preliminary matter, we reject plaintiff's suggestion that she was constructively discharged. Hartsel argues that the Mayor's failure to promote her to what she perceives as her rightful position created intolerable work conditions, such that her preemptive resignation the morning of December 31, 1992, was essentially a firing; she offers no other evidence that shows she was driven out of her prior position. If we were to accept this line of reasoning, every person passed over for a purportedly deserved promotion could bring an illegal discharge suit, and the distinction between the two would be erased. Instead, we treat her allegations as a failure to promote claim.

Liability in a disparate treatment case depends on whether the protected trait actually motivated the employer's decision. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *see Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993); *Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 871 (6th Cir. 1990). "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . " *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

Under the now-familiar burden-shifting principle of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93

S.Ct. 1817, 36 L.Ed.2d 668 (1973), a plaintiff establishes a *prima facie* case and creates a presumption of discrimination by showing: (1) membership in the protected class; (2) that she suffered adverse employment action; (3) that she was otherwise qualified for the position; and (4) following the plaintiff's rejection, the position was filled by a person outside of the protected class.[2] This general framework applies to both gender and age discrimination, with appropriate modification.

Once the *prima facie* case is made, a defendant may offer any legitimate, non-discriminatory reason for the employment action, which the plaintiff may rebut by evidence of pretext; however, the burden of proof always remains with the plaintiff. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). It is important to note that the defendant need not *prove* a nondiscriminatory reason for not promoting Hartsel, but need merely *articulate* a valid rationale. *Id.* at 514.

The district court found that Hartsel had satisfied the elements of a *prima facie* case for both sex and age discrimination, and we need not disturb its conclusion. Thus, the relevant issue is whether the proffered reason for promoting Brand rather than Hartsel was instead a pretext for illegal discrimination. In this case, the defendants claimed that their non-discriminatory reason was

---

[2] The Supreme Court has recently held that in ADEA suits, the replacement need not be younger than 40, although the difference in age between the plaintiff and the younger replacement may be probative of ageist bias. *O'Connor v. Consolidated Coin Caterers Corp.*, ___ U.S. ___, ___, 116 S. Ct. 1307, 1310, 134 L.Ed.2d 433 (1996).

that Hartsel lacked the computer skills necessary to lead the upgrading that the department needed. As plaintiff notes, summary judgment is not appropriate every time an employer offers this "business judgment" rationale. "The distinction lies between a poor business decision and a reason manufactured to avoid liability. Thus, facts may exist from which a reasonable jury could conclude that the employer's 'business decision' was so lacking in merit as to call into question its genuineness." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988).

Here, the facts do not at all lack merit, and much of the evidence most damaging to Hartsel's allegations comes from her own testimony. For example, Hartsel claims the defendants inflated the position's qualifications as a facade, designed to keep her from getting the job. In fact, she virtually concedes that she was not qualified for the superintendent's position, as defined by Keys:

> . . . I felt as if I had considerable experience in operating the terminals, turning the computer on and off, when necessary, and I had a lot of experience inputting into the computer on a daily basis. . . . I knew what I wanted out of the computer and I knew what I wanted put in, which I could explain to the data processing supervisor on what I needed and wanted. . . .

Hartsel Dep. at 18. Further, Hartsel admits that the mayor "knew I could not operate the computer, as far as putting the programs on and all this type of thing." This self-assessment is consistent with Coey's characterization of Hartsel's skills:

> From working with Ila and from working with the department, it is my understanding that

> computer skills was not her strong point. . . . We have a data processing supervisor[3] in the department, and Ila . . . did not work in that area and had limited knowledge of computer abilities.

Hartsel counters with the affidavits of several co-workers that the department functioned well when she was Acting Superintendent. William Fullgrabe, an Engineering Department employee, stated that "Hartsel was doing a good job" and "was well qualified for the Superintendent's position." Mary Grace stated that Hartsel "did a great job," that "I do not believe that it was necessary . . . to appoint someone with a data processing background," and that "[g]iven Ila Hartsel's experience in the department and her knowledge of the ordinances, rules and regulations, I believe that she was more qualified than Tom Brand." Tami White, a meter reader who worked in the Utilities Department when the cold prevented outside work on January 18 and 19, 1994, stated that the mail was four days behind under Brand, but "[w]hen Ila Hartsel was Acting Superintendent, the Department rarely got even two days behind on its mail."

---

[3] Mary Grace (apparently no relation to Joe or Billy Grace) had worked with Hartsel as the Utilities Department data processing supervisor. Ms. Grace majored in data processing in acquiring her Associates Degree in Applied Business from Lorain Community College. Ms. Grace opined that it was unnecessary to appoint a person with a data processing background to the superintendent position, in part because "I was available, with years of experience and a degree, to assist Ila Hartsel with any and all computer issues." However, the availability of Ms. Grace does not preclude the Mayor from hiring a candidate based on computer proficiency, nor does it transmute a business judgment into a pretext.

However, these affidavits miss the point. There is no doubt that Brand and Hartsel have differing strengths and weaknesses, and that Hartsel performed her duties as Office Manager and Acting Superintendent well. The law does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with. Rather, employers may not hire, fire, or promote for impermissible, discriminatory reasons. These affidavits reveal perhaps a reasonable difference in opinion, but their bald assertions and conclusory statements fail to provide any factual support for Hartsel's claim of sexist, ageist, or politically retaliatory animus.

Hartsel's failure to produce direct evidence of either pretext or discriminatory animus is fatal. There is no testimony that computer skills were not highly desirable for the superintendent's position, and Hartsel only disputes the degree of familiarity needed and argues that the job could have been done by a less expert employee, herself. The evidence supports the defendants' use of computer expertise as a hiring criterion: the city had long been urged to modernize its computer system; shortly after Hartsel resigned, it did so; the previous superintendent, Joe Grace, was much more familiar with computers than Hartsel; and, Brand was much more skilled with the technology than she was. As a result, Hartsel's circumstantial evidence is mere speculation ungrounded in fact, and Keys has demonstrated "an absence of evidence to support the non-moving party's case," as required by *Celotex*, 477 U.S. at 325.

To support her claims of discrimination based on gender, Hartsel cites the dearth of female department heads, although Hartsel admits that she does not know

how many women applied for department head positions.[4] Ironically, she bases her belief of gender discrimination on her "women's intuition" about "the tone of the whole situation." Hartsel Dep. at 41-44. Although she concedes that Keys never said or did anything to indicate a tone of bias – she claimed that "it is just one of those things that you feel" – she pointed to Keys's "body language" and "vibes." Clearly, Hartsel has failed to proffer sufficient information to put these extremely subjective and vague allegations in logical context, and has therefore failed to exceed the scintilla threshold to prevent summary judgment.

Hartsel infers age bias from the injustice of requiring older workers who "didn't grow up with [computers] the way these kids are doing" to compete for promotions against "younger" employees. In a sense, every technological advancement appears to favor the young, but only if one presupposes that older workers are more resistant to change and are adverse to learning new methods; ironically, this is the very type of ageist stereotype that

---

[4] In reality, this is not evidence of discriminatory treatment, but rather, a claim of disparate impact. A disparate impact theory of discrimination exists because "some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). A plaintiff must show for a prima facie case of disparate impact "that a specific employment practice or policy caused a significant disparate impact on a protected group," in this case, women or older workers. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). Hartsel identified no practice as causing such impact.

the ADEA was enacted to address. In fact, Brand is forty-three (within the protected class himself and hardly a callow youth), and he states that he also did not grow up with computers, but instead went to adult education classes and sought outside training to become more computer literate. We decline this invitation to hold that requiring computer skills for a promotion is alone sufficient to create a *prima facie* case of age discrimination.

Hartsel relies on several cases, all of which are distinguishable. The plaintiff supported her claim of constructive discharge in *Acrey v. American Sheep Industry Ass'n*, 981 F.2d 1569, 1573 (10th Cir. 1992), with testimony that the employer had told her that she was "too old" and "did not fit the image [the company] wished to project." Significantly, the plaintiff in *Acrey* was let go because she lacked the ability to use a new accounting system, but she offered evidence that the defendants had intentionally withheld the proper training to create an excuse to fire her. *Id.* at 1572-73. Likewise, *Krause v. Dresser Indus., Inc.*, 910 F.2d 674, 677 (10th Cir. 1990), is inapplicable because, in that case, the plaintiff demonstrated that his employer's proffered reasons were pretextual because the younger employee who was hired acquired the required computer skills only *after* the plaintiff was fired.

In a post-oral argument submission, Hartsel cites the unpublished case of *Kline v. TVA*, No. 92-5919, 1993 WL 288280 (6th Cir. July 29, 1993), for the proposition that whether, in that case, a "plaintiff was better qualified for the job is a question that should not have been decided in summary judgment proceedings," *id.* at *5, is also misplaced. Even accepting as a generality this statement of

the specific holding in *Kline*,[5] the fact remains that there is no question that Brand is more qualified than Hartsel – the parties have practically stipulated to that by their respective testimonies. The relevant factual inquiry is whether computer expertise was a valid job criterion, or if it was a pretense designed to thwart Hartsel's promotion. Since the latter claim is based solely on speculation and hunches, the plaintiff has not created a *genuine* issue of *material* fact sufficient to prevent summary judgment.

V

Hartsel's § 1983 claim of retaliatory "discharge" suffers from a similar absence of evidence. Unlike the claims of sex and age discrimination, where the evidence is based entirely on Hartsel's subjective beliefs and intuition, Hartsel has produced some circumstantial evidence that would buttress a claim of politically motivated conduct. However, that evidence consists of a hearsay statement by Coey that Mayor Keys "was very upset" that Hartsel had supported his opponent more than a year earlier, and the district court concluded that this was a mere scintilla which was refuted by the weight of contrary

---

[5] In *Kline*, the defendant contradicted himself on a material issue: he claimed that he used a draft job description in concluding that the plaintiff was not suited for the position, then twice stated during an EEOC investigation that the job description had been destroyed. *Kline*, at 4. In contrast, the testimony of Keys and other witnesses consistently supports their claim that computer skills were relevant to the superintendent's job.

evidence.[6] Hartsel also points to a conclusory affidavit of Joe Grace, which alleges that "[b]ased on my experience and observations of the decisions made by [Keys], I believe [his] decision not to appoint Ila Hartsel permanently to [Superintendent] was politically motivated."

Hartsel correctly notes that if a plaintiff produces evidence that her protected expression[7] was a "substantial" or "motivating" factor in a defendant's decision to terminate employment, the burden of proof shifts to the defendant to prove that it would have made the same decision in the absence of the protected conduct. *Mount Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Matulin v. Village of Lodi*, 862 F.2d 609, 613 (6th Cir. 1988). Usually, the question of causation is a factual issue to be resolved by a jury, *Matulin*, 862 F.2d at 613, and may be satisfied by circumstantial evidence. *Langford v. Lane*, 921 F.2d 677, 683 (6th Cir. 1991) (quoting *Conklin v. Lovely*, 834 F.2d 543, 546-47 (6th Cir. 1987)). Nonetheless, a court may grant summary judgment even in a causation inquiry, where it is warranted.[8] *Langford*, 921 F.2d at 683-84.

---

[6] In contrast, Brand was active in the state Democratic Party and had supported Keys in 1984 and 1988, performing routine campaign functions and attending some five-to fifteen-dollar-a-plate fundraising dinners.

[7] Hartsel's conduct is protected by the First Amendment because a mayor's election campaign is a matter of public concern, thus satisfying Doyle's first requirement. *Mount Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

[8] For instance, in *Langford*, a nursing home employee was fired for insubordination after speaking out against her

In this case, Hartsel has not shown that her support of Billy Grace in the May 1991 mayor's race at the debate was a substantial or motivating factor in Keys's decision to select a candidate with computer experience and proficiency, and therefore she has not carried her initial burden of proof. Hartsel's case hinges upon her claim that Coey told her in the fall of 1992 that the mayor was upset that she had supported Billy Grace. Coey does not remember such a remark, although he stated that he could have said it; Mayor Keys denies discussing Hartsel's political activity on Grace's behalf with anybody, and he was unsure whether he was even aware of her involvement. In any event, Hartsel's statement as to the content of Coey's comment must be disregarded, as being inadmissible hearsay. It is a statement being offered for the truth of the matter asserted, i.e., to show that Mayor Keys truly "was very upset" by Hartsel's political activity. *Wiley*, 20 F.3d at 225-26; Rule 56(e), Fed. R. Civ. P.; *State Mut. Life Assur. Co. v. Deer Creek Park*, 612 F.2d 259, 264 (6th Cir. 1979).

Moreover, the chronology of events in this case weakens Hartsel's claim of a grudge by Keys. Mayor Keys promoted Hartsel to acting Superintendent in May

---

supervisor at a public meeting. The evidence was undisputed that the employee had repeatedly clashed with co-workers and that two days before the public meeting she had refused to meet with the supervisor to discuss her grievances, which constituted insubordination. Because the court concluded that her supervisor could have fired her at any time, the plaintiff could show no disputed issue of material fact concerning her discharge, and the court granted summary judgment for the defendants.

1992, with an attendant raise of $13,000 per year, a year after the primary campaign against Billy Grace. Hartsel points to *no* actions or statements of Keys that indicate he held any grudge against her in the intervening time. Then, several months later, but before Joe Grace's resignation due to health problems, Coey purportedly told her that the Mayor was very upset with her. A couple of months later, Hartsel is passed over for promotion due to her lack of computer skills. Keys would be a shrewd and extravagant politician indeed to cover his tracks by promoting and rewarding the target of his ire while simultaneously fabricating an alibi premised on computerizing the Utilities Department. The district court appropriately deemed Coey's purported remark as at most a scintilla of evidence incapable of staving off summary judgment.

Even if we assume that Hartsel satisfied her threshold requirement of evidence of a substantial or motivating factor, so that the defendants must prove that they would have made the same decision in the absence of Hartsel's protected conduct, we believe that the defendants have met this burden. The decision to value a strong understanding of computers over other possible professional skills is a quintessential example of a business judgment, which must be respected if there is evidence to support its legitimacy. In this case, there is no dispute that the Utilities Department purchased a $165,000 computer system and indeed carried out a computerization program, and that Brand was integral in computerizing two other city departments and had familiarity with the system proposed for implementation. In contrast, Hartsel's cursory knowledge of computers left her dependent upon subordinate personnel, and thus an

inappropriate choice to *lead* an expensive and expansive restructuring of the department's computer system. Hartsel admits that Mayor Keys was aware of her minimal computer skills. Although Hartsel may have been capable of *operating* a computer system, she has never contended that she personally possessed the skills for supervising such an upgrade. Instead, Hartsel has consistently argued that she could use the computer skills of other employees to achieve the computerization, and that her familiarity with the department's rules and day-to-day operation was more important than computer proficiency.

Thus, summary judgment is appropriate where, as in *Langford*, "a reasonable jury could not fail to conclude from the uncontested evidence that [plaintiff] . . . would have fired her even if she had not [engaged in the protected conduct]." 921 F.2d at 683. The district court reached the same conclusion in this case, placing particular emphasis on the timing of Hartsel's endorsement of Keys's opponent and the later dispute. Keys's intervening elevation of Hartsel and concomitant $13,000 raise weaken her claim of a grudge,[9] especially where her

---

[9] This circuit has recently endorsed the "same actor inference," which allows an inference of a lack of discriminatory animus where the same person is responsible for both hiring and firing the individual. *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461 (6th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 785, 133 L.Ed.2d 736 (1996). This rationale seems applicable to Keys's decision to promote Hartsel temporarily but later find her lacking for the permanent position. It " . . . hardly makes sense to hire workers from a group one dislikes . . . only to fire them once they are on the job." *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991) (quotation omitted). Likewise, if Keys held a discriminatory animus to Hartsel because she was female, 62

accusation is based on an inadmissible single alleged remark by Coey and where the evidence of her lack of qualifications is so overwhelming.

We similarly disregard the affidavit of Joe Grace because it consists of subjective allegations and vague, conclusory allegations such as "I have witnessed many decisions made by Mayor Michael Keys regarding appointments, personnel, budgeting, funding and the purchase of new equipment. I believe those decisions . . . usually were based on [ ] political considerations." We also note that Grace's affidavit fails to link the purported "political" nature of Mayor Keys's decision-making process to Ila Hartsel's particular grievance, beyond his opinion that Hartsel was "more qualified for the job than Tom Brand." If this document were sufficient to preclude summary judgment, than [sic] every employee who failed to support Keys in an election would be able to get any claim of "politically motivated" job discrimination before a jury.

Furthermore, a civil servant is not allowed to immunize herself from being fired or denied a promotion by supporting an unpopular cause or losing candidate. As the Supreme Court noted in *Doyle*, "[a] borderline or marginal candidate . . . ought not to be able, by engaging in [protected] conduct, to prevent his employer from assessing his performance record and reaching a decision

---

years old, and supported his opponent in the primary, very little had happened to change that bias between the time he promoted her and his choice of Brand less than eight months later. The passage of time between those two events is a relevant factor in weighing the inference, *Buhrmaster*, 61 F.3d at 464.

not to rehire on the basis of that record." 429 U.S. at 285-86, *quoted in Langford*, 921 F.2d at 683.

Finally, Hartsel argues that by returning Hartsel to her prior position as office manager before accepting her resignation, Keys acted in a retaliatory fashion. She may be right – Keys might have been angered by her sudden and unexpected resignation – but again, there is no evidence that ties the "demotion" to her protected conduct endorsing Bill Grace almost two years before, or relating Keys's action to Hartsel's gender or age. Nor has Hartsel produced any evidence that this practice is out of the ordinary, or has been applied only to women or Democrats. Significantly, Keys took this step *after* she resigned, so it can hardly have contributed to her alleged "constructive discharge." Since the evidence is uncontradicted that her role as superintendent was temporary, Keys was not required to calculate her twenty-three years of accrued sick and vacation time at the higher salary she earned for less than a year; doing so would be fiscally irresponsible, costing Elyria additional thousands of dollars[10] without any accompanying municipal benefit, other than Hartsel's goodwill.

VI

Because we hold that the district court properly concluded that the plaintiff failed to show that the defendants' proffered non-discriminatory justifications were

---

[10] Hartsel received $31,972.59 in backpay, based on 1161.98 hours of owed holiday, vacation, and sick time.

pretextual, and because the district court properly concluded that there was no more than a mere scintilla of evidence of politically motivated retaliation, we AFFIRM the district court's grant of summary judgment to the defendants.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ILA HARTSEL, Plaintiff, vs. MICHAEL B. KEYS and THE CITY OF ELYRIA, et al., Defendants.	)	Case No. 1:93CV1227 MEMORANDUM AND ORDER (Filed May 26, 1994)

ALDRICH, J.

Ila Hartsel brings this action against Michael B. Keys, the City of Elyria, and the City of Elyria Utilities Department (collectively, "Elyria"), alleging discrimination on the basis of gender, in violation of Title VII, 42 U.S.C. § 2000e *et seq.;* discrimination on the basis of age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.;* and violation of her rights under the first and fourteenth amendments to the United States Constitution through 42 U.S.C. § 1983, and Art. I, § 11 of the Ohio Constitution.

The defendants moved for summary judgment on all claims on January 31, 1994. Hartsel opposed the motion.

For the reasons stated below, this Court grants Elyria's motion for summary judgment (#16).

I. FACTS

A. Background

Ila Hartsel began working for the City of Elyria, Ohio, in March, 1969, as a clerk-typist in the public utilities department. In April, 1977, Hartsel became the office supervisor for the department. The superintendent of the public utilities Department from before 1969 until 1992 was Joe Grace. In early 1991, Hartsel performed many of the superintendent's functions when Grace was out of the office due to his wife's illness.

In the spring of 1991, Hartsel supported Billy Grace, Joe Grace's son, in a primary contest for mayor of Elyria, against defendant Mayor Michael Keys. Hartsel assisted with signs, called voters, and sat with the Grace family at a candidate debate. (Hartsel Aff.¶ 4). In the fall of 1992, Elyria Safety Service Director Tim Coey allegedly told Hartsel that Keys was very upset with her for working on Billy Grace's campaign. (Hartsel Depo. at 9).

In April, 1992, Joe Grace's health problems often kept him from the office. Around May 1, 1992, Hartsel was made Acting Superintendent during Grace's absence. The new position, which defendants allege was "temporary," resulted in a $13,000 raise in Hartsel's salary, from $32,000 to $45,000 per year.

Hartsel has no experience in computer programming. She did have experience inputting information, such as adjustments to billings, into the computer on a daily basis. (Hartsel Depo. at 18).

Joe Grace retired as Superintendent effective November 30, 1992. Hartsel expressed to Keys and Safety Service

Director Coey her interest in being appointed the new "Acting Superintendent pending civil service action," who in due course would become the new permanent superintendent under the civil service law.

Thomas Brand, who had been deputy auditor in the auditor's department since August, 1990, also expressed an interest in the superintendent position. Brand had been a precinct committeeman in the Democratic Party since 1979. He had supported Mayor Keys in the mayoral races in 1984 and 1988, putting together yard signs. He also may have attended five- to fifteen-dollar fund-raiser dinners for Keys in 1984 and 1988. (Brand Depo. at 86-87).

In the mid-1980s, Brand had been employed in the installment department connected to the Elyria municipal court. Between 1984 and 1986, Brand and others demonstrated to the city administration the benefits of computerizing the installment department. With the help of Joe Grace, the public utilities superintendent, and others in the public utilities department who did programming, Brand successfully computerized the installment department. (Brand Depo. at 20-25). Sometime around 1988, Brand began a project to computerize the whole municipal court. Brand surveyed employees for their needs, and arranged demonstrations of available software meeting those needs. (*Id.* at 22-26). Eventually, Brand wrote the specifications for new software for the court, in order to prepare to accept bids from potential software suppliers. (*Id.* at 28). When the software was selected, Brand was sent to training to learn to operate the Hewlett-Packard system on which the new software would operate. (*Id.* at 35).

B. Hartsel's Resignation/Reclassification

Mayor Keys had told Hartsel he would make a final decision as to the acting superintendent around the first of the year. (Hartsel Depo. at 23). Around December 21, 1993, Hartsel met with Mayor Keys and discussed the position. Keys told Hartsel he had not made up his mind for sure, but said three times during that conversation that he was "99% sure" he was going to select someone with more computer experience than Hartsel. (*Id.* at 16; 23). Keys told Hartsel he hoped she stayed at the department because of her knowledge and experience. (*Id.* at 16). Hartsel testified that Keys told her they wanted her "to stay and help the new man."

Around the same time, Hartsel had heard through the office "grapevine" that Keys was going to select Thomas Brand. (*Id.* at 21). Hartsel considered the rumor and her conversation with Keys over the Christmas holiday. Hartsel knew that if she were not selected as the new acting superintendent pending civil service action, she would be returned to her position as office supervisor. She also assumed that she would have to train her replacement, although no one actually told her she would have to train the appointee. (*Id.* at 30-31). She decided that she could not continue in the acting superintendent position, given her inevitable return to her former position with a lower salary, and her assumptions that she would be asked to do the same work she was currently doing and to train the new person. (*Id.* at 30; Hartsel Aff. ¶¶ 5-6).

At 9:45 a.m. on December 31, 1992, Hartsel gave Keys a letter notifying him that she would resign her employment with the City of Elyria effective midnight, December 31, 1992. (*See* Brief in Oppositon Exh. 4). Keys accepted the resignation at 10:00 a.m. by letter. (*See* Brief in Opposition Exh. 5). Keys wrote Hartsel another letter at 11:40 a.m., which indicated that Keys had terminated Hartsel's "temporary re-classification of Acting Superintendent and reassign[ed]" Hartsel to her previous position as Office Supervisor, effective at 11:00 a.m. The same letter indicated that Keys had appointed Thomas Brand as acting superintendent of the Public Utilities Department, pending civil service action.

Keys testified that he reclassified Hartsel, and appointed Brand, effective 11:00 a.m. because he was concerned about the effective operation of the department. (Keys Depo. at 71-72). December 31 was a half-day in the city offices, and was followed by a long weekend. (*See* Coey Depo. at 39). Keys and Coey were concerned about leaving Hartsel in charge after the building would be closed, given that she had resigned after 20 years of employment with hardly any notice, and had returned her keys to the building. (Coey Depo. at 40).

Several months after Tom Brand's appointment, the administration approved Brand's request for funding to purchase an IBM AS 400 computer system costing over $100,000. Joe Grace had recommended that the city purchase a scaled-down version of the same computer system several times in the late 1980s. The administration had not approved those requests. (*See* Joe Grace Aff. ¶¶ 11-12). Ila Hartsel also unsuccessfully requested funding for a new system in 1992. Mary Grace Aff. ¶ 10. Keys

testified that many of the computerization recommendations which are now being addressed in the public utilities department are based on a study done when Joe Grace was superintendent. Keys Depo. at 35-37. According to Keys, it has been "common knowledge" for several years that the public utilities computer system needed updating. *Id.*

II. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .

The nature of materials properly presented in a summary judgment pleading is set forth in Federal Rule of Civil Procedure 56(e):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an

> adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In reviewing summary judgment motions, this Court must view the evidence in the light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Assn., Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252.

III. LAW

A. Title VII

The Supreme Court has recently reaffirmed and clarified the application in Title VII cases of the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *See St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). In a Title VII case alleging disparate treatment based on gender, a plaintiff establishes a *prima facie* case, and raises a presumption of discrimination by showing: (1) that she was within the protected class; (2) that she was the subject of adverse employment action; (3) that she was qualified for the position; and (4) that the person who was given the position is outside of the protected class.

If the plaintiff establishes a *prima facie* case, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the employer's actions. If the defendant offers such a legitimate reason, the presumption raised by the *prima facie* case is rebutted. *See Hicks*, 113 S. Ct. at 2748-49. The burden of proof, which always remains on the plaintiff, then requires the plaintiff to offer evidence that the reason proffered by the defendant is actually a pretext for impermissible discrimination. *Id.*

Evidence creating a fact issue as to the believability of the reasons offered by the defendant, "may, together with the elements of the *prima facie* case, suffice to show intentional discrimination." *Id.* at 2749. Thus under *Hicks*, summary judgment for the defendant is inappropriate if the plaintiff produces evidence which, if believed, shows

a "legitimate" reason to be a mere pretext for intentional discrimination.

B. ADEA

The ADEA provides in pertinent part:

> It shall be unlawful for an employer –
>
> (1) to . . . discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . .

29 U.S.C. § 623(a). A plaintiff raises the presumption of discrimination by showing that:

> (1) she was a member of the protected class (age 40 to 70);
>
> (2) she was subjected to adverse employment action;
>
> (3) she was qualified for the position; and
>
> (4) she was replaced by a younger person.

Simpson v. Midland-Ross Corp., 823 F.2d 937, 940 (6th Cir. 1987) (relying on *McDonnell Douglas*, 411 U.S. 792 (1973)). "Proof of the four *McDonnell Douglas* elements or other direct or statistical proof raises a rebuttable presumption of discrimination. As in the case of gender discrimination, the burden of production then shifts to the defendant employer to provide a legitimate nondiscriminatory reason for the action taken." *Simpson*, 823 F.2d at 940. The employee then bears the burden of showing that the

proffered reason was not the true reason for the employment decision, and that the real reason was the discriminatory motive. *Id.; see also Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 312-14 (6th Cir. 1989).

The *McDonnell Douglas* approach is not mechanistically applied in the Sixth Circuit in ADEA cases. *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1179 (6th Cir. 1983). The ultimate issue in age discrimination cases is whether age was a determining factor in the employer's decision. *Id.* at 1180. This is determined through a case-by-case approach to avoid interfering with the employer's legitimate business decisions. *Id.* at 1179; *see also Laugesen v. Anaconda*, 510 F.2d 307 (6th Cir. 1975).

C. Free Speech Claims

To prevail on a claim of adverse employment action in violation of the first amendment to the United States Constitution, a public employee must first offer evidence which shows that her protected expression played a substantial part, or in other words was a "motivating factor," in the employer's adverse decision. *Mount Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977). Once the plaintiff shows that her expression was a motivating factor behind the employer's decision, the employer has the opportunity to prove, by a preponderance of the evidence, that it would have made the same decision in the absence of the protected conduct. *Id.*

Promotions, transfers, and recalls after layoffs, as well as dismissals, if based on political affiliation or expression, are impermissible infringements on first

amendment rights. *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, 2737 (1990).

Although Hartsel's complaint contains a claim for a violation of her free speech rights under article I, section 11 of the Ohio Constitution, neither party addresses that claim separately in its summary judgment pleadings. This Court, moreover, is skeptical that Hartsel, a public employee protected by a civil service classification scheme, is without "other reasonably satisfactory remedies provided by statutory enactment and administrative process," which would bar a private cause of action to enforce Ohio Constitutional rights. *See Provens v. Stark County Bd. of Mental Retardation & Dev. Disabilities*, 64 Ohio St. 3d 252, 594 N.E.2d 959, Syllabus (1992).

To the extent that Hartsel *can* pursue her article I, section 11 claim, this Court finds that the Ohio Supreme Court would interpret such a claim consistently with the United States Constitution's free speech protections. Although this Court finds no case law describing the standard governing a political retaliation claim, Ohio courts in other contexts have consistently interpreted the protections of Ohio Constitution's free speech clause as co-extensive with those of the first amendment to the United States Constitution. *See, e.g., In re T.R.*, 52 Ohio St. 3d 6, 556 N.E. 2d 439, Syllabus ¶ 2 (1990) (press access to court proceedings); *City of Urbana ex rel. Newlin v. Downing, et al.*, 43 Ohio St. 3d 109, 539 N.E.2d 140 (1989) (obscenity); *City of Cleveland v. Sundermeier*, 48 Ohio App. 3d 204, 207, 549 N.E.2d 561, 564 (1989) (handbilling on private property); *Milkovich v. News-Herald*, 70 Ohio App. 3d 480, 591 N.E.2d 394 (1990) (defamation).

Thus this Court will interpret Hartsel's free speech claims under the Ohio Constitution consistently with the federal free speech claim.

IV. PLAINTIFF'S CLAIMS.

A. Gender and Age Discrimination

Hartsel alleges that the failure to promote her to the position of acting superintendent pending civil service action, as well as the "constructive discharge" and *de facto* "demotion" which resulted from the failure to promote, constituted illegal discrimination based on Hartsel's gender and age.

Elyria insists that Hartsel's resignation, which indisputably preceded the formal promotion of Thomas Brand, was not the result of a constructive discharge. Thus, Elyria contends, Hartsel was never subject to an adverse employment decision, and cannot establish a *prima facie* case of gender or age discrimination. This Court need not reach the question of whether the conditions of Hartsel's employment amounted to a constructive discharge. Even if Hartsel could establish a constructive discharge, and thus a *prima facie* case of discrimination relating to the denial of a promotion, this Court finds that the evidence proffered by Hartsel still fails to create a material fact issue precluding summary judgment.

In both gender and age cases in which the plaintiff has established a *prima facie* case, the defendant has the opportunity to offer a legitimate, non-discriminatory reason for its actions. Here, Elyria has offered such a reason: the city sought a new superintendent with computer

skills necessary to assist in the upgrade of the computers in the Public Utilities Department.

The evidence supports Elyria's justification. Mayor Keys testified it was "common knowledge" that the department needed a new system; Tim Coey characterized the necessary changes as going from the "Stone Age," "basically almost replacing the system." Keys Depo, at 36; Coey Depo. at 21-22. Coey testified that he and Keys felt they needed someone who could come in, study the department, its current computer programming and software, and recommend which changes in equipment and software should be implemented. Coey Depo. at 26. Hartsel, in fact, points repeatedly to the study of the department's computer needs put together in the late 1980s by Joe Grace, indicating the need for upgrading and modernizing.

Hartsel and Keys both testified that Keys told Hartsel he felt a need for someone with a strong computer background. Keys Depo. at 27-28; Hartsel Depo. at 16. It is undisputed that Hartsel's computer experience consisted entirely of "keying in" or "inputting" information on a daily basis. Hartsel admitted that Keys knew she could not operate a computer "as [in] putting the programs on and all this type of thing." Hartsel Depo. at 17-18. Likewise, Hartsel does not dispute that when the promotion decision was made, Brand had more experience with computers than did Hartsel. Brand was instrumental in computerizing the installment department, and eventually the entire Elyria municipal court, in the mid-1980s. During the latter project, Brand surveyed employees, evaluated department computer needs, wrote specifications for the bids for a system, evaluated the bids, helped

select a software company, and was sent to train on the new computer system once it was selected. Hartsel offers no evidence whatsoever that she had similar experience in implementing the computerization of a city department.

Moreover, Hartsel herself proffers evidence showing that since Brand's appointment, the public utilities department has indeed purchased a very expensive computer system. Brand testified that when he recommended the purchase of the IBM AS400 system in May, 1993, he was unaware of Joe Grace's recommendation of the purchase of a smaller version of the system in the early 1990s. Brand Depo. at 47-48. It is undisputed that the department continues to implement changes to the computer system, some of which are based on the report coordinated by Joe Grace in the late 1980s and early 1990s.

Hartsel's attempts to create a fact issue showing that Elyria's justification is really pretext for discrimination are without merit. Hartsel first claims that the justification is pretext because Elyria's interests in computerization of the department are a recent development, given that Joe Grace's prior requests for funding were rejected. In fact, all the testimony indicates that it has been clear for years that the department would need computer modernization; Joe Grace's late-80s report *supports* the legitimacy of Elyria's justification.

The fact that the city did not approve funding for a system prior to the appointment of Brand does nothing to call into question the city's intention to implement a new system under a new superintendent. Hartsel does not

show discrimination in *her* promotion, or more precisely, the required pretext, by showing that Elyria for years ignored *Joe Grace's* suggestions. At issue is the legitimacy of the city's reasoning in late 1992, when they failed to promote Hartsel.

Likewise, the fact that Joe and Mary Grace, who were recommending the new system in the late 1980s, had more computer experience than Brand, does not demonstrate pretext. It might show the city demonstrated bad judgment in waiting for a new computer system; at the same time, it shows that someone more computer-skilled than Hartsel ran the public utilities department for years, *and* was available to assist other departments in their attempts at computerization. This Court does not find that Joe Grace's computer skills create a fact issue relating to the believability of Elyria's intention to computerize the department in 1992, or the relative computer skills of *Brand* as compared with *Hartsel.*

Hartsel in fact maintains that the city's focus on the relative computer skills of Brand and Hartsel itself goes to pretext. This Court disagrees. The fact that Hartsel may have been more qualified in *other* areas does not prevent Elyria from relying on a *particular* skill – in this case, computer experience – in its hiring decision. As long as the basis of the decision is supported by the facts, and is not a front for discrimination, this Court does not question the business judgment of the employer. *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1160 (6th Cir. 1990).

Hartsel maintains that the fact that Elyria never, in the past, required heads of departments implementing computerization to have computer skills, shows pretext.

She points out that Joe Grace routinely offered assistance to other department heads. She also points out that Tom Brand himself, when computerizing the installment department and municipal court, relied on the programmers from the public utilities department, and was sent to Hewlett Packard for training on the system. This evidence does not demonstrate pretext. First, ironically, the promotion at issue is to *replace* Joe Grace, the very computer resource who was available to department heads in the past during their computerization efforts. Second, Hartsel has not shown that the circumstances surrounding the computerization of the municipal court in 1988 are in any way similar to those surrounding the utilities department in 1992. More important, in the 1980s Elyria was not making a new appointment to head the installment department or municipal court during its computerization – it was merely offering support to those current employees who would be running the computerization. In this case, Elyria was choosing a superintendent for the future. There is nothing illegal about seeking a candidate with the skills necessary to best perform the tasks ahead. And third, once again, Hartsel's description of the leeway and assistance given to Tom Brand while he computerized the other departments does not change the undisputed fact that as of 1992, Tom Brand had had experience computerizing a department, and Ila Hartsel did not have similar experience.

Hartsel relies on *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176 (6th Cir. 1983), an age discrimination case under the ADEA, in claiming that Elyria's assumptions about Hartsel's computer skills are evidence of pretext. The facts in *Blackwell* are critically distinguishable from those here. In

Blackwell, the employer denied the older plaintiff's specific request to expand his sales territory, so that he could better meet sales goals. The employer than gave the younger employee who replaced the plaintiff the exact accommodation which it had denied the plaintiff. Here, there is no evidence that when the administration indicated it needed computer experience, Hartsel ever requested accommodation such as training. Likewise, there is no evidence that upon his appointment, Brand was given training which had been denied Hartsel. The fact that in the mid-1980s, the city offered training to Brand when he assisted in the computerization of another department, does not support the claim that in 1991, the city discriminated against Hartsel by selecting Brand, who had more computer experience, for the superintendent's position.

Hartsel also maintains that the fact that Mayor Keys and Tim Coey do not have advanced computer skills demonstrates pretext. The skills of *other* department heads, or even the mayor, have no relationship whatsoever to the job skills desirable in a superintendent of the public utilities department in 1992. The relevant question in the pretext analysis is the legitimacy of the skills relied upon in the superintendent hiring decision, and such information about other departments does nothing to inform the pretext analysis.

Hartsel asserts that statistical evidence constitutes circumstantial evidence of illegal discriminatory motive based on gender and age. However, the isolated fact that Elyria has sixteen departments, with only one female department head appointed by the Board of Health and not the mayor, does nothing to show discrimination. This

Court has no evidence of the number of women in those departments; who applied for the positions; whether any women were qualified applicants; or how long the positions have been held by the same individual (Joe Grace, for example, was superintendent of one department for 30 years). A mere lack of women, without any explanatory background facts, does not even suggest discrimination.[1]

In short, the evidence proffered by Hartsel, taken in a light most favorable to her, simply does not discredit Elyria's claims that (1) it intended to computerize the public utilities department under a new superintendent; (2) computer skills were therefore relevant in the selection of the new superintendent; and (3) in 1992, Brand had more experience with computers, and specifically with evaluating and implementing a new computer system in a city department. Under *Hicks*, evidence discrediting the justification of the employer creates a fact issue making summary judgment inappropriate. However, none of Hartsel's evidence tends to show that the defendant's legitimate reason for its decision is unworthy of belief, or that discrimination was more likely the reason for the decision; taking *all* of that evidence together does not change the equation here.

---

[1] Such a fact, without more, also does not approach enough evidence for a *disparate impact* claim. A *prima facie* claim of disparate impact requires a showing of causation – that is, that a particular isolated practice or requirement by the employer *causes* a statistically disparate impact on a particular group. *See Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992). Hartsel has made no such allegation or showing about a particular requirement for city employment.

Taking all the evidence most favorably to Hartsel, this Court holds that no reasonable jury could find that Elyria's proffered reason for not promoting Hartsel is a pretext for gender discrimination under Title VII, or age discrimination under the ADEA. Accordingly, this Court grants the defendants' motion for summary judgment on Hartsel's gender and age discrimination claims.

B. Free Speech Claims

Hartsel claims that her first amendment rights were violated when she was not given the promotion, and when in retaliation, she was reclassified to her permanent position hours before her resignation was effective. The free speech analysis is similar to the legitimate reason/pretext analysis in a discrimination case. Here, however, if the plaintiff establishes a *prima facie* case, the *burden of proof* shifts to the defendant to *prove* it would have made the same decision in the absence of the protected expression.

Hartsel has offered insufficient evidence for this Court to find that her political expression was a "motivating factor" in the decision not to appoint her.

Keys knew that Hartsel supported his opponent in the mayoral primary in 1991. Brand was a Keys supporter. Hartsel was passed over for the promotion in favor of Brand. Hartsel avers that Tim Coey, in the fall of 1992, told her that Keys was "very upset" with her for supporting Billy Grace's campaign in the spring, 1991, mayoral primary. However, the causal connection between any anger on the part of the mayor and the decision not to promote Hartsel is, if anything, extremely attenuated.

The mayoral primary was almost a year and a half before the employment decision at issue. In the interim, a year after the primary, Keys promoted Hartsel to the position of acting superintendent in Joe Grace's absence, which resulted in a raise equivalent to $13,000 a year.

Hartsel also offers in support of her claim of political retaliation the affidavit of Joe Grace, who asserts that it is his "belief" that several decisions by the mayor during *Grace*'s tenure were politically motivated. Grace's statements, unsupported by any facts such as incriminating comments by the mayor, or a comparison with the treatment of other employees, which might suggest a political motivation against him or anyone else, are sheer speculation and do not support Hartsel's claims.

This Court finds the isolated statement that Keys was "very upset" with Hartsel's support of Billy Grace to be a mere scintilla of evidence of retaliatory motivation, which does not meet the "substantial factor" test set out in *Doyle*. Such slim evidence does not suffice to create a material fact issue as to the claim that the promotion decision was in retaliation for Hartsel's political expression.

Moreover, even if Hartsel's slim evidence does meet the substantial factor test, she still does not survive a motion for summary judgment. This Court finds that despite the higher burden of proof applied to the defendants' justification in the first amendment framework, Elyria has proved that it would have made the same decision in the absence of Hartsel's expressive activity.

As discussed above, there is undisputed evidence that Elyria intended to computerize the public utilities

department; that Brand's experience in computerizing a department exceeded Hartsel's; and that the public utilities department did indeed undergo an expensive modernization of its computer system soon into Brand's tenure. Hartsel's own evidence shows that Elyria had been exploring for years the need for the computerization, and the fact that when other department heads computerized their offices, superintendent Joe Grace had been the one to assist them. Just as Hartsel's evidence failed to show pretext, it fails to establish a fact issue as to the motivation for Elyria's decision.

Hartsel's other first amendment claim that Keys's reclassifying her to her former position as office supervisor hours before her resignation was effective constituted political retaliation, also fails the "motivating factor" test. Hartsel offers no evidence at all, except her speculation, that Keys's action was really retaliation against her for her political beliefs. There is no direct evidence of an improper motivation, and no other situation involving the treatment of a resignation to which this Court can compare Hartsel's situation.

Moreover, Elyria has offered an unrebutted legitimate explanation for the reclassification. Both Keys and Coey testified that city hall was only open a half day on December 31, the day Hartsel resigned. Both testified they were concerned about leaving Hartsel in charge after the building closed, given that citizen complaints which required the superintendent's attention often came in after hours; Hartsel had resigned with almost no notice, for "peronal reasons," after twenty years of service; and Hartsel had turned in her keys to the building. It is in no way unbelievable that in such a situation, Hartsel's

reliability for the rest of the day would be questioned. Hartsel's only evidence "rebutting" the reclassification explanation is her assertion that there was no reason to doubt Hartsel's competence for those few hours, given her years of loyal service. Such an argument does not effectively rebut the defendants' justification.

Given the lack of any direct or circumstantial evidence supporting the first amendment claim based on Hartsel's reclassification, this Court holds that no reasonable jury could find in Hartsel's favor on her political retaliation claim surrounding her reclassification.

In short, Elyria has offered sufficient unrebutted evidence to prove that it would have made the same decisions, namely not to promote Hartsel, and to reclassify her on the morning of December 31, 1992, even in the absence of her political opposition to the mayor in mid-1991. Hartsel has offered insufficient evidence to all into question Elyria's non-political explanation for the promotion, and no evidence calling into question the explanation for the reclassification. Accordingly, this Court grants the defendants summary judgment on Hartsel's free speech claims based on both the first amendment, and article I, section 11 of the Ohio Constitution.

V. SUMMARY

In sum, this Court grants the defendants summary judgment as to the age and gender discrimination claims under Title VII and the ADEA.

This Court further grants the defendants summary judgment on the claims under the first amendment of the

United States Constitution and article I, section 11 of the Ohio Constitution.

This Court dismisses the complaint against all defendants. This order is final and appealable.

IT IS SO ORDERED.

/s/ Ann Aldrich
ANN ALDRICH
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ILA HARTSEL, Plaintiff, vs. MICHAEL B. KEYS and THE CITY OF ELYRIA, et al., Defendants.	Case No. 1:93CV1227 ORDER (Filed May 26, 1994)

ALDRICH, J.

The Court has filed its memorandum and order granting defendants' motion for summary judgment; therefore,

IT IS ORDERED that defendants' motion for summary judgment is granted; final judgment is entered in favor of the defendants; and the case is dismissed.

IT IS FURTHER ORDERED that this judgment is final and appealable.

/s/ Ann Aldrich
ANN ALDRICH
UNITED STATES
DISTRICT JUDGE

Age Discrimination in Employment Act of 1967,
29 U.S.C. §621, *et seq.*

§623: Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer –

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

29 U.S.C.S. §623(a)(1) (1996).

FED. R. CIV. P. 56(c)

Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party in entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

FED. R. CIV. P. 56(c) (West 1996)

Supreme Court, U.S.
FILED
NOV 25 1996
CLERK

No. 96-486

In The

Supreme Court of the United States

October Term, 1996

ILA HARTSEL,

Petitioner,

vs.

MICHAEL B. KEYS,
INDIVIDUALLY AND IN HIS CAPACITY AS
MAYOR OF THE CITY OF ELYRIA, OHIO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Sixth Circuit

BRIEF IN OPPOSITION

TERRY S. SHILLING
Solicitor
City of Elyria
STEPHEN J. GURCHIK
Assistant Solicitor
328 Broad Street
City Hall
Elyria, OH 44035
(216) 323-5647

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

STATEMENT OF THE CASE

Petitioner was a 27 year employee of the City of Elyria, finally rising to the position of office Supervisor of the City of Elyria Public Utilities Department. The Superintendent of that department was one Joseph Grace. Mr. Grace was the City's computer resource person, and his department housed the majority of the computers used by the various city departments. After various studies and surveys, the administration determined that it was necessary and desirable to upgrade the system.

In early spring of 1991, Petitioner herein supported the son of Mr. Grace in his unsuccessful bid to unseat the Mayor. The Mayor was fully aware of that support.

In the spring of 1992, Mr. Grace took a leave of absence to care for his ailing wife. Petitioner filled the void by acting as Superintendent of the department. She requested the Mayor to confirm her position of Acting Superintendent. The Mayor did so, giving her, in the process, a temporary salary increase of $13,000.00 per year, thus raising her salary from $32,000.00 per year to $45,000.00 per year.

In October 1992, Mr. Grace tendered his resignation to the City, and Petitioner requested the Mayor to make her appointment permanent. The Mayor indicated to her that he would consider her, but that, frankly, he was looking for a person who had computer expertise and that he would probably not make her position permanent. Again, on 21 December 1992, Petitioner requested that she be Superintendent of the department. The Mayor advised her that he was 99% sure that he would select someone with more computer expertise than she.

As a result of that conversation and as the result of office "grapevine," Petitioner felt that one Thomas Brand, who did have a great deal of computer expertise, would be selected as the new Superintendent. She assumed that she would have to train her replacement, although no one told her that. On December 31, 1992 at approximately 9:00 a.m. Petitioner tendered her resignation, effective at midnight that day, and turned in her keys to the building. As a long holiday weekend was about to begin, the Mayor wished to have someone of authority in place. He subsequently transferred Petitioner back to her permanent classification of office supervisor and appointed Thomas Brand Acting Superintendent, pending Civil Service Commission action.

Petitioner then filed her lawsuit, alleging, inter alia, gender discrimination, age discrimination, and a violation of her freedom of speech for supporting an opponent of the Mayor in the previous primary.

The District Court granted the Defendants' summary judgment, which the Sixth Circuit upheld and is now pending before this Court on petition for writ.

ARGUMENT

Under the *McDonnell Douglas Corp. vs. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed 2d 668 (1973) and its progeny, a plaintiff establishes a prima facie case and creates a presumption of discrimination by showing: (1) membership in the protected class; (2) that she suffered adverse employment action; (3) that she was otherwise qualified for the position; and, (4) that following the

plaintiff's rejection, the position was filled by a person outside of the protected class. This general framework applies to both gender and age discrimination.

Once the defendant makes that prima facie case, the defendant may offer any legitimate, non-discriminatory reason for the employment action. The plaintiff may rebut this with evidence of pretext. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 126 L.Ed 2d 407 (1993). The defendant need not *prove (emphasis added)* a non-discriminatory reason for not promoting Petitioner, but merely *articulate (emphasis added)* a valid rationale. *Id.* at 514.

Petitioner herself merely alleges that the defendants' given reasons were pretextual. And that, upon distilling her argument to its purest form, is what she is asking this court to declare. She asks this Court to overturn summary judgment in all ADEA cases when the plaintiff merely articulates pretext. Petition, p. 13, para. 2 She states " . . . the articulation of such a reason – in and of itself – creates an issue for the finder of fact."

We do not believe that this Court wishes to change to the plaintiff's proposed standard in ADEA cases. Such a standard would completely eliminate summary judgment and clog the trial courts with, as here, all manner of dubious claims. This case, on the facts, is clearly one which the Court should clear from the docket in a summary fashion. The facts, mostly from the mouth of Petitioner, establish the genuineness of the employer's proffered employment decision. She concedes in her own deposition that she could not program computers. She claims to know of the Mayor's discriminatory animus

because of her "women's intuition," "the tone of the whole situation," "just one of those things you feel," The Mayor's "body language," and "vibes." (Hartsel Depo.) Her further information came from the office "grapevine." The Circuit Court correctly noted that, as to gender discrimination, "Hartsel has failed to proffer sufficient information to put these extremely subjective and vague allegations in logical context, and has therefore failed to exceed the scintilla threshold to prevent summary judgment." App. 13, line 8.

In support of her age discrimination allegation, Petitioner offers the information that she "could not operate the computer, as far as putting the programs on and all this type of thing," and that "older workers didn't grow up with [computers] the way these kids are doing." Again, the Circuit Court declined " . . . this invitation to hold that requiring computer skills for a promotion is alone sufficient to create a prima facie case of age discrimination." App. 14, line 6. Petitioner, even under the reading of *Hicks supra,* has not submitted any evidence of pretext. She has shown, by all of her evidence, the genuineness of the defendant's reason for promoting another person.

Petitioner argues, somewhat disingenuously, that she does not wish this Court to review its decision in *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993), Petition p. 11, para. 2. But Petitioner then goes on at p. 13, para. 2, to urge the Court to do just that by asking that the Court find "the articulation of such a reason – in and of itself – creates an issue for the finder of fact." In fact, this Court held that the Plaintiff is entitled to an "opportunity to *demonstrate (emphasis added)* that the proffered reason for

the employment decision was not the true reason for the employment decision." *U.S. Postal Service Board of Govs. v. Aikens*, 460 U.S. 711, 716 (1983). Respondent submits that to "demonstrate" pretext does not mean merely to "articulate" pretext, and thus this Court should deny the petition.

CONCLUSION

Simply put, this Court should not abolish summary judgment as a tool for weeding out specious claims of gender and age discrimination. The standards previously announced in *Burdine, supra,* its progeny, and in *Hicks, supra,* are clearly proper and reasonable methods of evaluating the relative merits of a lawsuit. To change the standard, as the Petitioner here requests, to one which merely requires an articulation that the proffered reason was pretextual, instead of requiring a Petitioner to "demonstrate" that pretext, will cause a nightmare of litigation in the lower courts. Given this potential outcome, this Court should deny Petitioner's writ.

Respectfully submitted,

TERRY S. SHILLING
Solicitor
City of Elyria
STEPHEN J. GURCHIK
Assistant Solicitor
328 Broad Street
City Hall
Elyria, OH 44035
(216) 323-5647